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Supreme Court, U.S.
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No. 08- 08-362 SEP 17 2008

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IN THE

Supreme Court of the United States

STATE OF ILLINOIS,

Petitioner,

v.

MARIANO LOPEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a court may consider a defendant's age and experience with law enforcement when determining whether the defendant was seized for purposes of the Fourth Amendment or "in custody" for purposes of the Fifth Amendment;

Whether a person who voluntarily accompanies police to the station for questioning and is left in a closed interview room while the police attempt to verify the information provided is seized under the Fourth Amendment;

Whether a *de novo* or a "clear error" standard of review applies to a trial court's determination regarding whether the police have deliberately engaged in a "question first, warn later" scheme to circumvent *Miranda v. Arizona.*

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2 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure*, § 6.6(c) (3d ed. 2007) 17, 19

3 Wayne R. LaFave, *Search and Seizure*, § 5.1(a) (4th ed. 2004) 18

The State of Illinois respectfully petitions for a writ of certiorari to review the judgment of the Illinois Supreme Court in this case.

OPINIONS BELOW

The opinion of the Illinois Supreme Court (App. 1a-63a) is reported at __ N.E.2d __, No. 103768, 2008 Ill. LEXIS 630 (Ill. Sup. Ct. June 19, 2008). The opinion of the Illinois Appellate Court, First District (App. 64a-78a), is reported at 367 Ill. App. 3d 817, 856 N.E.2d 471 (2006). The transcript of the trial court's May 8, 2001, ruling on respondent's motion to suppress statements is unreported (App. 79a–82a), as is the trial court's July 16, 1999, ruling on respondent's motion to quash arrest and suppress evidence (App. 83a-88a).

STATEMENT OF JURISDICTION

The order and judgment of the Illinois Supreme Court was entered on June 19, 2008. The State did not file a petition for rehearing. This petition for a writ of certiorari is filed within ninety days of that court's order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. On July 14, 1998, Chicago police entered the apartment of the victim, Hector Andrade, in response to a report of a burglary. App. 2a. Inside the apartment, the police discovered the victim's dead body on the living room floor in a pool of blood. App. 2a. The victim had been stabbed many times, and his arms, legs, and head were bound with duct tape. App. 2a. The police found a large-blade knife and burned-out cigarettes near his body. App. 2a. The apartment smelled of gas and appeared to have been ransacked. App. 2a.

Respondent Mariano Lopez gave both oral and written statements in which he confessed to participating in the robbery and murder of the victim. App. 2a. Respondent's two co-defendants (Jose Leal and William Andrade, who was not related to the victim) also confessed. App. 2a. Prior to trial, respondent filed a motion to quash his arrest and suppress evidence pursuant to the Fourth Amendment and a motion to suppress his statements pursuant to the Fifth Amendment. App. 2a. The trial court conducted separate hearings on each motion. App. 2a. The trial court denied the motion to quash arrest, finding that respondent voluntarily accompanied the police to the police station. App. 15a, 83a-88a. The trial court granted the motion to suppress statements with respect to respondent's oral statement, based on its conclusion that the police had probable cause to arrest him at the time he gave that statement and should have advised him of his *Miranda* rights before questioning him. App. 23a, 81a-82a. The trial court, however, declined to suppress respondent's written statement, holding that it was given voluntarily and was sufficiently attenuated from the oral statement. App. 23a, 82a.

2. The trial court made these determinations based on the following evidence, which was adduced at the hearings of the motions to quash arrest and suppress statements.

Hearing regarding the motion to quash arrest

Respondent testified that on July 21, 1998, when he was 15 years old, two police officers came to his home while he was asleep. App. 2a. They entered his house and told him that he was going with them to the station. App. 3a. They said they wanted to talk to him about gangs and not about a murder. App. 3a. One of the officers pushed and grabbed respondent and said "come on." App. 3a. Respondent did not think he had any choice but to accompany them. App. 3a. Exiting his apartment, respondent noticed that a third officer standing outside had his gun drawn. App. 3a. Respondent acknowledged that the other officers never drew their guns and that he was not handcuffed. App. 3a.

Respondent rode with the police to the station and testified that no one told him that he could arrange for his own transportation. App. 30a. At the station, respondent was put in a room and repeatedly questioned between three and four hours. App. 4a. He was not handcuffed, and he was allowed to use the bathroom, and he was offered food. App. 4a. Respondent denied that he was ever left alone. App. 4a. Respondent admitted that he signed a written confession. App. 4a. According to respondent, he was allowed to see his father only after its completion. App. 4a. He admitted, however, that he did not ask to see his parents or to go home. App. 30a. Respondent's father also signed the handwritten statement. App. 4a.

Respondent's mother, Maria Luisa Garcia, testified that two men came to the house and asked, in Spanish, for respondent. App. 4a. One of the men identified himself as a detective and said he was taking respondent for questioning and that respondent had to cooperate. App. 4a. No one explained that it was a murder investigation or where they were taking respondent. App. 5a. When respondent entered the room, the detective told him that they were taking him. His mother then saw the detective "like push" respondent and tell him "let's go." App. 5a. Respondent's mother acknowledged that the detective gave her a card with his name and phone number on it. App. 6a. She denied, however, being told she could go to the station and stated that respondent was never told that he did not have to go. App. 5a. Respondent's mother also acknowledged that respondent was not handcuffed when he left. App. 5a. She stated that her neighbor Lydia called the number on the card many times that day but never got any information, and, in addition, when her husband found out what had happened he went looking for respondent. App. 6a. At approximately 10:00 p.m., the same officers came back and searched respondent's things. App. 7a. When they left, respondent's father went with them. App. 7a.

Respondent's father, Mariano Lopez, Sr., testified that after getting home from work, he went to several police stations looking for respondent, but no one knew where he was. App. 7a.

Respondent's neighbor, Lydia Villanueva, testified that she spoke to Detective Bautista twice on the phone and told him that respondent's mother was worried and

wanted to know what was going on. App. 8a. He told her that they were still questioning respondent and he would be home later, but he did not say where respondent was. App. 8a. Villanueva admitted that she never asked to speak with respondent and never asked if the parents could talk to respondent or if they could see him. App. 9a.

Detective Bautista testified that on July 28, 1998, while investigating Hector Andrade's murder, he and his partner, Detective Keane, learned that respondent might be a possible witness and went to his home at around noon. App. 9a. After respondent's mother answered the door, Detective Bautista, speaking Spanish, identified himself and his partner and asked if they could talk to respondent about a murder investigation in which his name had been mentioned. App. 9a-10a. Respondent's mother agreed, invited them in, and went to get respondent. App. 9a-10a.

When respondent came into the room, Detective Bautista introduced himself and his partner, told respondent his name had come up in a murder investigation, and said they would like to ask him some questions at the station. App. 10a. After respondent agreed to go with them, Detective Bautista asked his mother for permission to speak with him at the station. App. 10a. Detective Bautista said respondent would be at Kedzie and Harrison, and gave her a business card with his name and phone number. App. 10a.

When respondent's mother asked if she should go with them, Detective Bautista explained that it was unnecessary, but would be allowed. App. 10a-11a.

Respondent's mother gave no indication of wanting to go and said she would call later to check on her son. App. 11a. At the time the police drove respondent to the station, he was not a suspect. App. 35a. According to Detective Bautista, no one touched respondent, he was not handcuffed, and no one took out his gun. App. 11a.

Detective Bautista further explained that, once at the station, respondent was put in an interview room, which was normal procedure for witnesses. App. 11a. He was not handcuffed and the door was left unlocked. App. 11a. At approximately 1:00 p.m. Detectives Bautista and Keane spoke to respondent for between fifteen and twenty minutes, and respondent gave them the name of a certain individual. App. 11a. Because respondent was a witness, he was not given *Miranda* rights and no youth officer was present. App. 11a. Detective Bautista explained to respondent that they needed to verify the information he had given them and that they would leave him alone for a while. App. 11a. Detective Bautista asked respondent if he needed anything, offered him food, and told him to knock on the door if he wanted anything. App. 11a-12a. According to Detective Bautista, witnesses at police stations generally are not allowed to walk around freely and, accordingly, it was normal procedure to escort witnesses if they needed to use the bathroom or any services. App. 12a. Although respondent was not told that he was free to leave, he did not ask to leave, and, indeed, Detective Bautista believed that respondent was free to leave if he wanted because he was not under arrest. App. 12a. Even while alone in the room, respondent was not handcuffed and the door was closed, but not locked. App. 12a. Detectives Bautista and Keane left the station

for two hours and, upon returning, they checked in on respondent who indicated that he was okay and wanted no food. App. 12a. Shortly before 6:00 p.m. the detectives spoke with Jose Leal who implicated himself and respondent in the murder. App. 13a.

Detectives Bautista and Keane spoke again to respondent, who, upon being told of Leal's statements gave an inculpatory statement. App. 13a. The detectives then stopped the interview and arrested respondent and advised him of his constitutional rights, including his juvenile rights. App. 13a. Detective Bautista stated that he did not return to respondent's home that evening, he did receive a telephone call about respondent, and he told the caller that the police were still investigating, but neither hid respondent's location from the caller nor said respondent would be returned home. App. 12a.

Detective Keane corroborated Detective Bautista's testimony. He stated that when he and Detective Bautista went to respondent's house, they considered him a witness. App. 13a. They told him that they were investigating a murder and asked if he would go with them to the station to answer questions. App. 14a. They did not say that they wanted to talk about gangs. App. 14a. After respondent agreed to go with them, Detective Bautista spoke with his mother in Spanish and gave her a business card. App. 14a. Respondent did not ask for anyone to go with him, he was not handcuffed, no one touched him, no guns were drawn, and neither Detective Bautista nor Detective Keane returned to the home. App. 14a.

In denying respondent's motion to quash arrest, the trial court made factual findings that demonstrated that it found the testimony of the officers to be more credible than that of respondent and his witnesses. App. 15a.

Hearing regarding the motion to suppress statements

The parties stipulated that the trial court could consider the testimony from the hearing on respondent's motion to quash arrest. App. 15a. The People also presented the live testimony of Detective Keane, Detective Carlos Velez, and ASA Steven Fine. App. 15a-22a.

Detective Keane testified that on the morning of July 21, 1998, he learned that Leal had given a written statement to police in which he identified William Andrade and respondent as Hector Andrade's killers. App. 15a. Accompanied by Detective Bautista, Detective Keane went to respondent's home and brought him to the station. App. 15a. The detectives did not tell respondent or his mother about Leal's allegations. App. 15a. Because the detectives considered respondent a witness, they did not advise him of his constitutional rights. App. 15a.

At the station, the detectives spoke briefly with respondent and told him about Leal's allegations, which respondent denied. App. 15a-16a. Respondent directed the detectives to other people whom he claimed had information about the murder, and they told him they were going to continue their investigation based on this information. App. 15a-16a. Respondent said he was fine staying in the room and waiting for them. App. 16a.

The detectives then re-interviewed Leal, who for the first time implicated himself as well as respondent and William Andrade. App. 16a. According to Leal, he, William Andrade, and respondent went to the victim's apartment looking for money. App. 16a. After Andrade stabbed the victim, the three men ran out. App. 16a. Based on this statement, the detectives placed Leal under arrest. App. 16a.

Detectives Keane and Bautista then told respondent about Leal's most recent statement and asked whether he was involved in the murder. App. 16a-17a. They did not advise respondent of his rights prior to this conversation because respondent had merely supplied the detectives with information, and, moreover, Leal had given inconsistent statements, so they were not sure whether respondent "had anything to do with anything at that point" and were still conducting their investigation. App. 16a. Detective Keane expressly denied withholding *Miranda* warnings in order to get respondent to confess. App. 17a. Respondent admitted that he, Leal and William Andrade entered the victim's apartment, that the victim was tied up and stabbed, and that they left with some "proceeds." App. 17a. The detectives then stopped the interview, advised respondent of his juvenile and *Miranda* rights, and contacted respondent's parents and the State's Attorney's Office. App. 17a.

ASA Steven Fine arrived at the station at approximately 8:00 p.m., and respondent's father arrived about a half hour later. App. 17a-18a. Respondent's father spoke with respondent alone before ASA Fine spoke to him. App. 17a-18a. With respondent's father,

Detective Velez – who was acting as a Spanish interpreter for the father – and Detective Keane present, ASA Fine introduced himself to respondent and re-advised respondent of his juvenile and *Miranda* rights. App. 18a. After acknowledging and waiving his rights, respondent gave an oral statement in response to ASA Fine's questions. App. 18a. Each time ASA Fine asked respondent a question and respondent gave a response, Detective Velez translated the question and response for respondent's father. App. 18a.

Respondent then decided to give a written statement. App. 18a. No one told him he could leave if he gave a statement. App. 18a. After respondent's written statement was drafted, ASA Fine reviewed it with him and allowed him to make corrections. App. 18a. Detective Velez continued to translate for respondent's father during the preparation of the written statement, and after completion, it was signed by respondent, ASA Fine, Detective Keane, Detective Velez and respondent's father. App. 18a.

In the signed written statement, respondent admitted that on the day of the murder, he and co-defendants William Andrade and Leal executed a premeditated plan to rob and kill Hector Andrade. App. 24a. They forced their way into the victim's apartment, tackled him to the ground, and taped his arms and legs with duct tape. App. 24a. They then searched the apartment for drugs and money. App. 25a. Respondent saw Leal go into the kitchen and grab a knife from a drawer. App. 24a. Leal then walked back to the victim, who was face down and being restrained by Andrade. App. 24a. Leal kneeled down next to the victim

and stabbed the victim with the knife until he stopped moving. App. 24a. Leal then helped respondent search the bedroom and they found a wallet. App. 25a. Leal also found some jewelry and William Andrade found a camera. App. 25a. After Leal turned on the gas to the stove, the three men left the apartment together. App. 25a. They ran for a few blocks and then split up. App. 25a. Respondent gave Leal the victim's wallet and went home. App. 25a. A few days later, Leal called and invited respondent to the movies saying he would "treat" because he had $200 in cash. App. 25a.

Respondent also testified at the hearing on the motion to suppress statements. He stated that he was kept in a locked interview room and answered the detectives' questions only because they told him that if he gave a statement he could go home and, in addition, that the detectives told him what to say. App. 20a. Respondent acknowledged speaking to ASA Fine, but claimed not to know what an Assistant State's Attorney was and also claimed that his statement to ASA Fine was a lie. App. 20a. Respondent acknowledged that ASA Fine, but not Detective Keane, advised him of his *Miranda* and juvenile rights, but claimed not to have understood them. App. 20a. Respondent admitted, however, that he did not tell this to ASA Fine when specifically asked. App. 20a. Respondent further testified that he was present for the writing of his written statement, but stated that he signed it only so that he could go home. App. 20a. Respondent denied that he spoke with his father before signing the statement and claimed that his father was not present at the time of the statement but signed it only after its completion. App. 21a.

Respondent's father admitted signing the handwritten statement, but claimed that he signed it because he was told it was a burglary case. App. 21a. Respondent's father denied talking to respondent privately prior to the statement, denied that the statement was read to him in Spanish, and denied being present when it was given. App. 21a.

The Trial

3. After the trial court denied respondent's motion to suppress the written statement, that statement was admitted into evidence at respondent's trial, where it was corroborated by evidence recovered from the crime scene. App. 56a. Consistent with the statement, the victim was found lying face down in the living room, tied up with duct tape and stabbed numerous times with a knife. App. 23a-24a, 56a. William Andrade's fingerprint was found on the duct tape with which the victim was bound, and Leal's fingerprints were found on a beer bottle in the apartment. App. 23a-24a, 56a. There were obvious signs that the apartment had been searched. App. 2a. Finally, there was a strong odor of natural gas coming from the stove. App. 23a, 56a.

Following a bench trial, the court found respondent guilty of first degree murder. App. 25a. He was sentenced to twenty-three years in prison. App. 25a.

The Appeals

4. On appeal to the Illinois Appellate Court, respondent challenged the trial court's denial of his motions to quash arrest and to suppress the written statement. App. 25a, 65a. The appellate court affirmed the trial court's determination that respondent voluntarily accompanied the police to the station. App. 25a, 74a-75a. In addition, the appellate court rejected respondent's argument that the evidence supported a finding that the police employed a "question first, warn later" interrogation technique and, accordingly, affirmed the trial court's admission of the written statement. App. 25a, 77a-78a.

On appeal, the Illinois Supreme Court agreed that respondent had voluntarily come to the police station for questioning. App. 36a. That court nevertheless held that respondent's written statement should have been suppressed under *Missouri v. Seibert*, 542 U.S. 600 (2004), because, first, respondent's voluntary presence at the station became involuntary once he was left in an interview room with the door closed, App. 37a-38a, and second, because the police intentionally withheld *Miranda* warnings, a conclusion the court reached only by rejecting the factual findings of the trial court. App. 50a-54a.

REASONS FOR GRANTING THE PETITION

I.

THIS COURT HAS NOT SQUARELY RESOLVED THE IMPORTANT ISSUE OF WHETHER THE OBJECTIVE "REASONABLE PERSON" TEST MAY INCLUDE CONSIDERATION OF THE SUSPECT'S PARTICULAR CHARACTERISTICS.

This case presents this Court with the opportunity to decide on direct appeal whether the application of the "reasonable person" test may include consideration of the suspect's personal characteristics, outside of the shadow of the standard of review dictated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). This case involves the Illinois Supreme Court's faulty determination that a minor's custodial status, for Fourth Amendment purposes, requires consideration of characteristics personal to the individual, including his age, educational background, and experience with the criminal justice system. Essentially, the Illinois Supreme Court discarded the established objective "reasonable person" standard and, in cases involving minors, replaced it with a subjective standard. Such action is properly regarded as conflicting with this Court's holding in *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004), and warrants further consideration by this Court. While this Court has repeatedly held that the "reasonable person" tests under the Fourth and Fifth Amendments are objective ones, and disagreed in *Yarborough* with the argument that this Court's prior cases allowed the consideration of a suspect's particular characteristics as part of the

"reasonable person" test, this Court did not squarely decide this issue on the merits in *Yarborough*.

This is because, in *Yarborough*, the Court addressed the question of whether a suspect's age and experience with the police should be considered as part of the "reasonable person" test in the context of the standard set forth by the AEDPA. Under the AEDPA,

> a federal court can grant an application for a writ of habeas corpus on behalf of a person held pursuant to a state-court judgment if the state-court adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'

Yarborough, 541 U.S. at 655 (quoting 28 U.S.C. § 2254(d)). Thus, although the Court appeared to reject consideration of a suspect's individual characteristics, its reasoning was limited to whether the state court had unreasonably applied clearly established federal law when it failed to consider the defendant's age and experience. *Id.* at 668 ("For these reasons, the state court's failure to consider Alvarado's age does not provide a proper basis for finding that the state court's decision was an unreasonable application of clearly established law"). And Justice O'Connor, in her concurring opinion, stated that "[t]here may be cases in which a suspect's age will be relevant to the *Miranda* 'custody' inquiry." *Id.* at 669 (O'Connor, J., concurring).

Given the standard of review applied in *Yarborough*, this Court did not have the opportunity to decide this issue squarely. As one court has noted, "[a]s is apparent, *Alvarado* did not strictly decide whether an accused's juvenile status is irrelevant to the *Miranda* custody determination. That was unnecessary for its decision." *United States v. Little*, 851 A.2d 1280, 1286 (D.C. App. 2004). And as one set of commentators has observed, *Yarborough* "hardly settles the matter" for the following reasons:

> (i) *Yarborough* was a deferential-review habeas corpus case in which the issue was *only* whether the state court, in not taking those characteristics into account, had made an unreasonable application of clearly established law; (ii) when the majority hypothesized about what the outcome would be on de novo review, it only said that reliance on the suspect's prior history with law enforcement would be "improper" because in "most cases, police officers will not know a suspect's interrogation history"; (iii) the four dissenters concluded that Alvarado's age should have been considered on the custody issue, as it was "known to the police" and is "a widely shared characteristic that generates commonsense conclusions about behavior and perception" that consequently would "not complicate the 'in custody' inquiry"; and (iv) one member of the majority allowed that Alvarado's age might have been relevant had he not been "almost 18 years old at the time of his interview."

2 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure*, § 6.6(c) (3d ed. 2007) (emphasis in original).

In the absence of a clear ruling on the precise issue of whether the reasonable person standard must include consideration of a suspect's age and experience, lower courts and commentators have divided on the issue of whether such personal characteristics should be considered. By contrast, other courts have injected consideration of a suspect's age and experience into what is supposed to be an objective reasonable person test. *See, e.g., Evans v. Montana Eleventh Judicial District Court*, 995 P.2d 455, 459 (Mont. 2002); *Ramirez v. State*, 739 So.2d 568, 574 (Fla. 1999); *State v. Werner*, 9 S.W.3d 590, 598 (Mo. 2000); *United States v. Erving L.*, 147 F.3d 1240, 1247-48 (10th Cir. 1998); *People v. T.C.*, 898 P.2d 20, 25 (Colo. 1995) (en banc); *Commonwealth v. A Juvenile*, 521 N.E.2d 1368, 1370 (Mass. 1988); *United States v. Wauneka*, 770 F.2d 1434, 1438-39 (9th Cir. 1985). A number of courts have expressly refused to consider personal characteristics such as a suspect's age when utilizing the objective reasonable person standard. *See, e.g., People v. Croom*, 883 N.E.2d 681, 689 (Ill. App. Ct. 2008) (declining to consider the defendant's age when determining whether he was in custody for *Miranda* purposes, citing *Yarborough*); *State v. Turner*, 838 A.2d 947, 963 (Conn. 2004). Some commentators have followed suit. About the Fourth Amendment, one has written that "[o]bviously, the youth or inexperience of the suspect must be taken into account." 3 Wayne R. LaFave, *Search and Seizure*, § 5.1(a) (4th ed. 2004) (citing *State v. Werner*, 9 S.W.3d 590 (Mo. 2000); *Seals v. United States*, 325 F.2d 1006 (D.C. Cir. 1963)). As for the Fifth Amendment, others have also speculated that "[t]he *Berkemer* 'reasonable person' test probably requires consideration of certain unique characteristics of the suspect (e.g., his youth), as several lower courts have

concluded, notwithstanding *Yarborough v. Alvarado*." 2 Wayne R. LaFave, *et al.*, *Criminal Procedure*, § 6.6(c).

This case squarely implicates this divergence in authority because the Illinois Supreme Court expressly considered respondent's age, educational background, and his experience with the criminal justice system when it determined that he was seized for purposes of the Fourth Amendment and in custody for purposes of the Fifth Amendment. App. 28a-29a. Indeed, consideration of these factors was crucial to the court's determination that respondent's voluntary presence at the police station at some point became involuntary. This is because the other factors that the court relied on – that respondent was told to wait in the interview room while the police continued their investigation, that he was not permitted to walk around the station without an escort, that the door to the interview room was shut (although he was told to knock if he needed to use the restroom or other assistance), and that he was not explicitly advised that he was free to leave (even though the police believed he was permitted to do so) (App. 37a) – cannot on their own support the court's holding that respondent was involuntarily detained. As Detective Bautista explained, witnesses are generally not allowed to walk around freely around the police station, and the police require that witnesses be escorted by police personnel if they need to use the bathroom or other services. App. 12a.

This approach makes sense. It would be unsafe to allow members of the general public to wander the back halls of a police station freely without an escort. Police

must be allowed to keep doors closed, and any rule that prevents such safety measures is nonsensical and unwarranted under the Constitution. Where potential witnesses are concerned, safety concerns are particularly pronounced. As a result, restricting the movement of witnesses in the police station and keeping interview room doors closed protects them from being seen by others at the station, such as arrestees who may seek to retaliate against them for speaking to the police. Indeed, it bears noting that the movements of the public are often restricted when people visit places other than a police station. For instance, patients are not allowed to wander freely throughout the halls of a physician's office and the doors to each room are usually closed. Certainly, a reasonable person would not conclude that he or she was not free to leave a doctor's office.

The Illinois Supreme Court turned those safety measures upside down when it ruled that such safeguards turned respondent's voluntary presence at the station into a seizure. The court effectively held that the police must warn a person who has voluntarily agreed to answer questions that he or she is free to end the questioning and leave at any time – a rule that this Court has never endorsed. Additionally, the Illinois Supreme Court has required the police to not only divine the person's age (some people do lie about their age), but also their degree of experience with the criminal justice system. Such requirements have never been considered to be constitutional mandates and to require such would unduly impede the swift and effective resolution of crimes. (*See* Arg. II). The court reached these unlikely conclusions based on its view that implicit consent to remain at the station while the police

investigate is a "proposed fiction," "particularly . . . when the person in question is a minor." App. 37a-38a.

Thus, free from the strictures of the AEDPA, this case presents the Court with the opportunity to squarely decide whether the objective reasonable person test should incorporate a suspect's personal characteristics, such as a suspect's age and experience, as part of that inquiry.

II.

THE ILLINOIS SUPREME COURT'S CONSIDERATION OF THE RESPONDENT'S AGE AND EXPERIENCE WHEN DETERMINING WHETHER HE WAS SEIZED OR IN CUSTODY DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT.

The Illinois Supreme Court incorrectly altered the objective "reasonable person" test to include consideration of the suspect's age, educational background, and experience with the justice system when determining whether a suspect has been seized under the Fourth Amendment or is in custody under the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436 (1965). As we explain above, in *Yarborough*, this Court has rejected the notion that the objective "reasonable person" test should include the consideration of the suspect's individual characteristics, including the suspect's age – albeit in the habeas context. *Yarborough*, 541 U.S. at 668. As a result, the decision of the Illinois Supreme Court on this important federal constitutional question is in tension with *Yarborough*.

In addition, by incorporating the suspect's particular characteristics, the Illinois ruling conflicts with this Court's consistent rule that the "reasonable person" standard under both the Fourth and Fifth Amendments is an objective, not a subjective, test.

The "reasonable person" standards under the Fourth and Fifth Amendments are substantially the same. "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J., plurality opinion); *see also Florida v. Royer*, 460 U.S. 491, 502 (1983) (adopting the *Mendenhall* standard).

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Mendenhall, 446 U.S. at 554 (Stewart, J.). "In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Id.* at 555. This Court has continued to adhere to the rule that, "in order to determine whether a particular encounter constitutes a seizure, a court must

consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 439 (1991). Moreover, "the 'reasonable person' test presupposes an *innocent* person." *Id.* at 438 (emphasis in original).

Thus, the Court's Fourth Amendment jurisprudence has not focused on the suspect's age or experience with law enforcement when determining whether a seizure has occurred. As for the Fifth Amendment, in *Yarborough*, this Court adhered to the objective "reasonable person" test, noting that "[o]ur opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration." *Yarborough*, 541 U.S. at 666. Thus, while the Ninth Circuit in *Yarborough*, like the Illinois Supreme Court here, attempted to equate the *Miranda* custody test with other inquiries – such as the voluntariness of a statement – that incorporate a person's individual characteristics, this Court explained that "[t]here is an important conceptual difference between the *Miranda* custody test and the line of cases from other contexts considering age and experience." *Id.* "The objective test furthers 'the clarity of [*Miranda*'s] rule,' . . . ensuring that the police do not need 'to make guesses as to [the circumstances] at issue before deciding how they may interrogate the suspect.'" *Id.* (*quoting Berkemer v. McCarty*, 468 U.S. 420, 430-31 (1984)).

The objective test necessarily focuses on the restrictive circumstances themselves rather than on the

suspect's perceptions because "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Behler*, 463 U.S. 1121, 1125 (1983) (*quoting Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). This Court has observed that "[o]ur decisions make clear that the initial determination of custody depends on the *objective* circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the persons being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994) (emphasis added). To determine whether the circumstances surrounding the questioning are sufficiently restrictive to constitute custody, this Court has looked to "how a reasonable man in the suspect's position would have understood his situation." *Berkemer*, 468 U.S. at 442.

As the Court observed in *Yarborough*, "[i]t is possible to subsume a subjective factor into an objective test by making the latter more specific in its formulation." *Yarborough*, 541 U.S. at 667. In that case, the Ninth Circuit made just such an error when it "styled its inquiry as an objective test by considering what a 'reasonable 17-year-old, with no prior history of arrest or police interviews' would perceive." *Id.* The Illinois Supreme Court did the same when it stated that "[a]lthough defendant did not receive *Miranda* warnings, and no other indicia of formal arrest were present, we cannot conclude that a *reasonable juvenile* in defendant's position would have felt free to leave the police station." App. 37a. (emphasis added).

In short, the Illinois Supreme Court's decision disregards this Court's objective reasonable person standard for determining whether a person is under arrest for purposes of the Fourth Amendment or in custody for purposes of the Fifth Amendment and thus conflicts with this Court's decisions on this issue. In hinging the reasonableness inquiry on respondent's age and experience, the court "ignored the argument that the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics . . . could be viewed as creating a subjective inquiry." *Yarborough*, 541 U.S. at 668. Accordingly, petitioner respectfully requests that this Court grant *certiorari*.

III.

THE CIRCUITS HAVE SPLIT OVER WHETHER TO USE A *DE NOVO* OR A "CLEAR ERROR" STANDARD WHEN REVIEWING WHETHER THE POLICE HAVE DELIBERATELY ENGAGED IN A "QUESTION FIRST, WARN LATER" SCHEME IN ORDER TO CIRCUMVENT *MIRANDA v. ARIZONA*.

Missouri v. Seibert, 542 U.S. 600 (2004), does not set forth a standard of review for courts to use when evaluating whether the police intentionally employed a two-step interrogation process in which warnings given pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), were deliberately withheld until after the suspect has confessed. In the wake of this silence, the federal courts of appeal have split on this issue. The Illinois Supreme Court applied a *de novo* standard of review, a standard that has been adopted by two circuits. By contrast, six

circuits have reviewed this issue only for clear error. This case presents the opportunity to resolve this mature circuit split and, in addition, clarify what constitutes warnings being deliberately withheld, as the Illinois Supreme Court believed that the delay in giving the warnings was itself conclusive evidence of deliberateness, despite the contrary factual findings by the trial court.

In *Oregon v. Elstad*, 470 U.S. 298 (1985), this Court addressed the question whether the failure of an interrogating officer to issue *Miranda* warnings rendered subsequent statements, made after *Miranda* warnings were given and a waiver of rights obtained, inadmissible. 470 U.S. at 300, 303. This Court ruled that the failure to administer *Miranda* warnings prior to the defendant's initial inculpatory statement did not automatically require suppression of his subsequent Mirandized confession. *Id.* at 300, 308, 318. Rather, where the initial unwarned statement was given voluntarily without "any coercion or improper tactics," the admissibility of the second statement depended only on whether it, too, was voluntary and obtained in compliance with *Miranda*. *Id.* at 318. Thus, this Court articulated the principle that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id.* By contrast, if a prior statement was actually coerced, "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over to the second confession." *Id.* at 310.

In *Seibert*, this Court addressed the "question first, warn later" interrogation technique used to sidestep *Miranda*. Pursuant to department policy, the interrogating officer in *Seibert* questioned the defendant at the police station about an arson murder without first advising her of her rights. 542 U.S. at 604-05. After the defendant incriminated herself, the police gave her a twenty-minute coffee break. *Id.* When the interrogation resumed, the police advised the defendant of her *Miranda* rights, which she waived. *Id.* The same initial interrogating officer then confronted the defendant with her earlier admission and elicited a confession, which the prosecution used to convict her. *Id.* The officer testified that "he made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the questions 'until I get the answers she's already provided once.'" *Id.* at 605-06.

This Court's plurality opinion explained that this deliberate, two-round interrogation technique was unconstitutional because it "effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted." *Id.* at 617. The plurality characterized the situation in *Elstad* as one involving an inadvertent violation of *Miranda* on the part of law enforcement. *Id.* at 615. The plurality contrasted *Elstad* by listing "a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and second, the continuity of

police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id.* at 615. Based on its application of these "relevant facts," the plurality concluded that the intentionally delayed warnings given in the case before it were ineffective and therefore, made the second statement inadmissible. *Id.* at 616-17.

Justice Kennedy, in his concurring opinion, viewed the plurality's "relevant facts" for inadmissibility as too broad. *Id.* at 621-22. Rather, Justice Kennedy opined that the plurality's "relevant facts" in determining the effectiveness of midstream warnings should be limited to situations in which the police set out deliberately to withhold *Miranda* warnings until after a confession has been secured. *Id.* Specifically, Justice Kennedy wrote, "[t]he admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed." *Id.* at 622.

Pursuant to the principle of *Marks v. United States*, 430 U.S. 188, 193 (1977), that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," several courts, including the Illinois Supreme Court in this case, have found Justice Kennedy's opinion to be controlling. *See United States v. Courtney*, 463 F.3d 333, 338-39 (5th Cir. 2006); *United States v. Ollie*, 442 F.3d 1135, 1142 (8th Cir. 2006); *United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006); *United States v. Naranjo*, 426 F.3d 221, 231-32 (3d Cir.

2005); *United States v. Mashburn*, 406 F.3d 303, 308-09 (4th Cir. 2005); *United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004). Nevertheless, "[d]etermining the proper application of the *Marks* rule to *Seibert* is not easy, because arguably Justice Kennedy's proposed holding in his concurrence was rejected by a majority of the Court." *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006).

As a result of the absence of a definitive holding, a significant split has developed over the proper standard of review for a *Seibert* claim. The majority of circuits that have addressed whether the police deliberately engaged in a deliberate two-step approach to circumvent *Miranda* have reviewed the trial court's decision for clear error. *See, e.g., United States v. Stewart*, No. 06-4323, slip op. at 8 (7th Cir., Aug. 8, 2008); *United States v. Torres-Lona*, 491 F.3d 750, 758 (8th Cir. 2007); *United States v. Narvaez-Gomez*, 489 F.3d 970, 974 (9th Cir. 2007); *United States v. Nunez-Sanchez*, 478 F.3d 663, 668-69 (5th Cir. 2007); *United States v. Naranjo*, 426 F.3d 221, 232 (3d Cir. 2005); *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005).

Unlike these six circuits, however, two circuits appear to apply a *de novo* standard when reviewing whether the police deliberately used a "question first, warn later" method to circumvent *Miranda*. *See United States v. Carter*, 489 F.3d 528, 536 (2d Cir. 2007); *United States v. Street*, 472 F.3d 1298, 1314 (11th Cir. 2006). With this case, the Illinois Supreme Court has joined this minority view by reviewing this issue *de novo* without deference to the trial court's factual findings. App. 53a-54a.

This Court should grant certiorari to resolve this circuit split and clarify that the appropriate standard of review for this issue is a review for clear error. As the Seventh Circuit recently explained, "[t]he question of whether the interrogating officer deliberately withheld *Miranda* warnings will invariably turn on the credibility of the officer's testimony in light of the totality of the circumstances surrounding the interrogation." *Stewart*, slip op. at 8. "This is a factual finding entitled to deference on appeal. . . ." *Id.* A trial judge's factual determinations are entitled to deference because a "trial judge views the facts of a particular case in light of the distinctive features and events of the community. . . ." *Ornelas v. United States*, 517 U.S. 690, 699 (1996). "The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference." *Id.* Under the "clear error" standard, a reviewing court will accept the trial court's credibility findings "unless it is contrary to the laws of nature, or is so inconsistent or improbable on its face that no reasonable factfinder could accept it." *United States v. Huebner*, 356 F.3d 807, 813 (7th Cir. 2004). In other words, "determinations of witness credibility can virtually never be clear error." *United States v. Biggs*, 491 F.3d 616, 621 (7th Cir. 2007).

Here, the Illinois Supreme Court did not apply this standard. Notwithstanding the testimony by Detectives Bautista and Keane that they did not give respondent *Miranda* warnings prior to his oral statement because they did not consider him a suspect, App. 13a, 16a, and the trial court's determination that the police testimony was credible, App. 15a, 23a, and specifically, that Detective Keane was credible when he testified that the

police did not deliberately withhold *Miranda* warnings in order to get a confession, the Illinois Supreme Court did not credit Detective Keane's testimony. App. 50a-51a. In so doing, the court expressly recognized that it was overturning the factual findings of the trial court:

> We acknowledge that Detective Keane testified otherwise, stating that defendant was still considered a witness after Leal's incriminating statement. We also acknowledge that the trial court found Detective Keane's testimony to be credible overall, and defendant does not challenge the trial court's credibility assessment as being against the manifest weight of the evidence.
>
> However, the record demonstrates a contradiction in Detective Keane's testimony which the trial court did not specifically address and we cannot ignore. Although Detective Keane claimed that defendant was not a suspect, he nevertheless testified that defendant would not have been free to leave the police station at 6 p.m. after Leal's incriminating statement had been obtained. In light of these facts, we can think of no legitimate reason why the detectives failed to give defendant his *Miranda* warnings prior to the 6 p.m. confrontation, other than a deliberate decision to circumvent *Miranda* in hopes of obtaining a confession, which would ultimately lead to a handwritten statement.

App. 50a. The Illinois Supreme Court could not have overturned the trial court's factual findings under a

"clear error" standard because the trial court's findings were not "contrary to the laws of nature, or [] so inconsistent or improbable on its face that no reasonable factfinder could accept it." *Huebner*, 356 F.3d at 813. A trial judge's factual determinations are entitled to deference because a "trial judge views the facts of a particular case in light of the distinctive features and events of the community. . . ." *Ornelas*, 517 U.S. at 699. In disregarding the testimony that the trial court had found to be credible, the Illinois Supreme Court effectively applied a *de novo* standard that failed to give appropriate deference to the trial court's findings of fact.

In short, the lower courts are in conflict over the appropriate standard of review to be applied when determining whether the police deliberately engaged in a "question first, warn later" scheme to circumvent *Miranda*. In light of the importance of this question, this mature conflict warrants the Court's resolution.

In concert with establishing the appropriate standard of review, this case also presents this Court with the opportunity to clarify *Seibert* regarding what is needed to show that a delay in giving *Miranda* warnings was not deliberate. Unlike in *Seibert*, where the police explained that they purposely withheld *Miranda* warnings until they got a confession, the police here did no such thing. Detective Keane expressly denied withholding the warnings to get a statement from respondent. The police did not initially warn respondent because they still considered him a witness, which was not true in *Seibert*. Moreover, in *Seibert*, the unwarned interrogation was "systematic, exhaustive, and managed with psychological skill," and "there was little, if

anything, of incriminating potential left unsaid." *Seibert*, 542 U.S. at 616. Here, however, the initial questioning was not exhaustive, and respondent's statement after the warnings was far more comprehensive and detailed than his initial unwarned statement. In his brief oral statement, respondent merely admitted that he entered the victim's apartment, that the victim was tied up and stabbed, and that he and his co-defendants took some proceeds. Respondent's handwritten statement to the prosecutor, on the other hand, was twelve pages long. In addition, the warned interrogation in *Seibert* came after a pause of just fifteen to twenty minutes *Id.*, while the delay in this case between the unwarned questioning and his later confession after being warned was over three hours. Another significant difference is that the same officer conducted both the unwarned and warned interrogations in *Seibert*, *Id.*, while here a prosecutor – not a police officer – conducted the warned questioning. Finally, unlike in *Seibert*, there was no evidence that respondent's unwarned statement was used to prompt his statements in his later, warned confession. The factual distinctions between the two cases will allow this Court to clarify the fractured decision in *Seibert*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF ILLINOIS FILED JUNE 19, 2008

SUPREME COURT OF ILLINOIS

Docket No. 103768

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

v.

MARIANO LOPEZ,

Appellant.

June 19, 2008, Opinion Filed

OPINION BY: FITZGERALD

OPINION

Defendant, Mariano Lopez, was charged with first degree murder, armed robbery, home invasion, attempted aggravated arson, and aggravated unlawful restraint. He gave a handwritten statement confessing to the crimes, which was used against him at trial. Defendant was convicted in the circuit court of Cook County and sentenced to a total prison term of 23 years. The appellate court affirmed. 367 Ill. App. 3d 817, 856 N.E.2d 471, 305 Ill. Dec. 666. We granted defendant's petition for leave to appeal (210 Ill. 2d R. 315) and now consider whether the trial court erred in denying defendant's motions to quash arrest and suppress evidence. For the reasons that follow, we reverse and remand.

Appendix A

BACKGROUND

On the morning of July 14, 1998, police responded to a report of a burglary at the apartment of the victim, Hector Andrade. Upon entering the apartment, police found the victim's dead body on the living room floor in a pool of blood. The victim had been stabbed numerous times and his arms, legs, and head were bound with duct tape. A large-blade knife was found near his body. The apartment smelled of gas, burned-out cigarettes were found near the body and on top of an entertainment center, and the apartment appeared to have been ransacked. Defendant, who was 15 years old at the time, gave both oral and written statements confessing to his part in the crime.[1] Prior to trial, defendant filed motions to quash arrest and suppress the oral and written statements he made to authorities. The trial court conducted separate hearings on defendant's motions to quash arrest and suppress statements.

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1. Codefendants Jose Leal and William Andrade, who was known as "Chucky," also confessed. Leal was convicted of first degree murder and sentenced to 23 years' imprisonment. His conviction and sentence were affirmed on appeal. *People v. Leal*, No. 1-03-2226 (2006) (unpublished order under Supreme Court Rule 23). Andrade (who is not related to the victim, Hector Andrade) was convicted of first degree murder, home invasion, and aggravated unlawful restraint. He was sentenced to 40 years' imprisonment. The appellate court affirmed. *People v. Andrade*, No. 1-01-1719, 2003 Ill. App. LEXIS 1597 (2003) (unpublished order under Supreme Court Rule 23). Leal and Andrade are not parties to this appeal.

Appendix A

The evidence presented at the hearing on defendant's motion to quash demonstrated that detectives went to defendant's apartment at approximately 12 p.m. on July 28, 1998, after defendant's name was brought up while detectives were investigating the victim's murder. Defendant testified that he was asleep when two police officers arrived at his apartment. His mother woke him, and he went into the kitchen. One officer was standing in the kitchen and the other officer was in the doorway of the apartment. The officer in the kitchen told defendant to put his shoes on because they were going to the police station. The officer grabbed defendant and said, "You're going with us." The officer also pushed defendant two to three times, but did not push hard. The officers did not tell defendant they were investigating a homicide; they told him they wanted to ask him questions about gangs. Although one of the officers was speaking to defendant's mother in Spanish, he did not tell defendant's mother that she could accompany defendant to the police station. Defendant stated that he went with the officers because, "I thought I had to go." When the officers escorted defendant out of the back door of his apartment, he noticed that another police officer was waiting outside with his gun drawn. Defendant stated that he was placed in the backseat of an unmarked police car but was not handcuffed. Both officers sat in the front seat. The third officer followed behind in a marked squad car. The officers accompanying defendant did not draw their guns at any time.

Appendix A

When he arrived at the police station, defendant was placed in a room and questioned about Hector's murder. Defendant testified that he was in the room for three to four hours and was questioned "all the time" he was in the room by three officers, except "[t]here would be like two minutes they would go out and they would come right back." He explained that he was only left alone for a short period of time and the officers never left to investigate any of the information he provided to them. Defendant was not handcuffed during this questioning, but the door to the room was closed, and defendant believed it was locked from the outside with a slide lock. Defendant was never told that he was free to leave and defendant did not feel that he was free to go. Defendant did not see his parents until he signed the handwritten statement admitting to the crime. After he gave the signed confession, he was allowed to see his father. Defendant's father then signed the statement in defendant's presence. Defendant stated that he was allowed to use the restroom and was offered food, although he did not accept any.

Defendant's mother, Maria Luisa Garcia, testified that she was at home with defendant, who was sleeping in his bedroom, and her 18-year-old daughter, who was sleeping in the living room, when two men knocked on the door. She answered the knock and one man said, in Spanish, that he was a detective and then asked about her son. The detective announced, "I'm going to take him." He also said: "I come for Mariano. I'm going to ask him some questions. *** He has to cooperate with us." Garcia stated that she did not respond to the

detective; in fact, she did not speak to him at all. Even though Garcia did not invite the detective in and did not give him permission to enter, he and the other man walked into the kitchen area of her apartment. The other man did not identify himself and Garcia did not know whether he was a police officer. She thought he was "American" but could not be sure of his race.

Garcia explained that the apartment was "very small." When the detective and the other man entered the kitchen, defendant heard them and came into the kitchen, without being called. The detective ordered defendant to put his shoes on and said, "Let's go." According to Garcia, the officers stood in her kitchen for approximately 30 minutes, without speaking to her, while defendant got dressed and put his shoes on. When defendant was ready to leave, the detective gave defendant a slight push, but "didn't hurt him." The detective and the other man then took defendant out of the apartment. Defendant was not handcuffed.

Garcia initially stated that she asked the detective "where are you taking him, why are you taking him," but the detective would not answer. Later, Garcia testified that she never spoke to the detective after their initial conversation at the door of her apartment and that he never spoke to her. Garcia indicated that the detective never advised defendant that he did not have to go and never told Garcia that she could accompany her son. Garcia did not ask if she could accompany her son to the police station. Further, she did not give detectives permission to take her son, although she did

not object. The detective gave Garcia a business card with his name and telephone number before leaving with defendant.

Garcia testified that her daughter remained in the living room and never entered the kitchen while the detectives were there. Garcia initially testified that her daughter was sleeping during this time, but later testified that her daughter was in a hurry to get to work and, therefore, did not participate in the encounter with the detectives at the apartment.

Garcia stated that she contacted her neighbor, Lydia Villanueva, after the detectives left with defendant. Villanueva speaks English and Garcia asked her to call the number left by the detective. Garcia did not attempt to call herself because she does not speak English and because she was crying and upset. Villanueva came over at around 3 p.m. and called the number on the detective's business card. Villanueva spoke to a detective, who told her that "he could not say anything." After that initial call, Villanueva called the police station more than five times to inquire about defendant. She could not get any information.

Garcia testified that her husband returned home from work around 6:30 p.m. She did not have any information about her son or his whereabouts at that time. Garcia explained that her husband left and went to look for defendant because "this detective would not tell us anything." Garcia first indicated that she did not see any police officers again that day. However, when

asked a second time, Garcia testified that a detective called her at 9 p.m. and asked permission to return to her apartment to search it. She gave him permission. At 10 p.m., the same men who came to her apartment earlier in the day returned and searched. At that point, Garcia's husband had returned after unsuccessfully attempting to locate defendant at various police stations. After they searched and were unable to find anything, the detectives offered to bring her to the police station to see her son. She did not go because she was too upset. Her husband went instead.

Defendant's father, Mariano Lopez, Sr., testified that he was at work and was not aware of the events of the day until he came home at 6:30 p.m. His wife did not call him at work to inform him that defendant had been taken to the police station. When Lopez arrived at his apartment, Villanueva was there. She told him that she had spoken to the police three or four times and they said that police officers would bring defendant home. At about 8 p.m., Villanueva called the police again. After that call, Lopez still did not know where his son was, so he went to a police station on Racine and another station on Damen looking for him. At the Racine station, Lopez asked officers to help him contact Detective Al Bautista, whose name was on the business card left with Garcia, but the officers refused to assist him. They also refused to help him locate his son. Lopez did not ask any officers at the Damen station to help him find Detective Bautista. He only asked if his son was there.

Appendix A

Lydia Villanueva testified that she lives near the Lopez family and knows them because her son is a friend of the defendant. On July 28, 2001, at about 2:30 p.m., defendant's sister, Hilda Lopez, went to Villanueva's house and told her that defendant had been taken to the police station. Villanueva went to the Lopez home and spoke with Garcia, who gave Villanueva a business card with Detective Bautista's name and telephone number on it. Villanueva started making calls. She first called the telephone number on the card at 3 p.m. Detective Bautista answered the call and Villanueva told him that defendant's mother was crying and nervous and wanted to know what was happening. Detective Bautista stated that he was going to ask defendant some questions and bring him back home, and that his mother did not need to worry. Villanueva called the number on the card a second time, at approximately 4 p.m., and spoke to Detective Bautista again. He stated that they were still questioning defendant, that they would bring him home, and that his mother should not worry. Villanueva did not ask where defendant was, and Detective Bautista did not volunteer that information. Villanueva called back between 5:30 and 6:30 p.m. and was told by the person who answered that Detective Bautista was on the street investigating. Villanueva was advised to call back in one hour. She called back at 8 p.m. and spoke to Detective Bautista for a third time. She told him that defendant's parents were very concerned. Detective Bautista reiterated that they were asking defendant questions and would have him home soon.

Villanueva testified that she never asked Detective Bautista to tell her where defendant was being questioned. Defendant's parents never requested that she ascertain that information. Villanueva also indicated that she never asked to speak with defendant or inquired as to whether defendant's parents could speak to him or join him at the police station. Detective Bautista did not volunteer any of that information either. Detective Bautista did question Villanueva at one point about her own son. The record does not provide information concerning the nature of that questioning. Telephone records admitted into evidence showed that five calls were made to the police station from defendant's home between 2:30 p.m. and 7:30 p.m.

Detective Alfonso Bautista testified that he and his partner, Detective Dennis Keane,[2] were assigned to investigate the murder of Hector Andrade. In the course of their investigation, they learned that defendant was a possible witness to the crime and went to his apartment at around noon on July 28, 1998, to speak with him. At that time, defendant was not considered a suspect.

Detective Bautista explained that he introduced himself and his partner, Detective Keane, to defendant's mother when she answered the door, speaking to her in Spanish. Detective Bautista asked Garcia if defendant lived there, and then asked if they could to speak to defendant. Garcia agreed and invited them into the

2. Dennis Keane testified that he was promoted to sergeant. However, because he was a detective at the time relevant to this case, we will refer to him to as Detective Keane.

kitchen area of her apartment. Once inside, Detective Bautista explained that defendant's name had been mentioned by other people in the course of a homicide investigation and he wanted to speak to defendant. Garcia left the kitchen area to call defendant. After a short while, she returned from the back of the apartment with defendant and a teenage girl, later identified as defendant's sister. Detective Bautista informed defendant that they were conducting a homicide investigation, that his name had been mentioned by other people they had talked to, and they "needed to-or wanted to ask him some questions." Detective Bautista also told defendant that he would prefer to conduct the questioning at the police station. He did not advise defendant that he had the option of being questioned in his home. Detective Bautista explained that it is his normal practice to interview witnesses at the police station when investigating a homicide; not on the street or in their homes. However, he admitted that two other witnesses to this crime were interviewed at their homes.

Defendant agreed to accompany the detectives to the police station. Detective Bautista then told defendant's mother that he wanted to ask defendant some questions, and asked "if it was okay with her if we went to the area rather than at the house to ask the questions." Detective Bautista also advised Garcia that they would be taking defendant to Harrison and Kedzie, and gave her his business card. Defendant's sister asked if it was necessary for defendant's mother to accompany defendant to the police station. Detective Bautista

advised Garcia that she could come to the police station if she so desired. Garcia did not indicate that she wanted to accompany her son. She stated that she would call later to check on defendant.

Detective Bautista testified that he and Detective Keane escorted defendant out of the apartment, but did not put their hands on him. On the way out, Detective Keane walked in front of defendant and Detective Bautista walked behind him. Defendant was not given *Miranda* warnings and was not handcuffed, and the detectives did not draw their guns. No other detectives were present at defendant's apartment. Defendant was driven in an unmarked car to the police station. The detectives did not offer defendant the opportunity to arrange his own transportation, and defendant did not state that he wanted to take alternate transportation.

At about 1 p.m., defendant was placed in an interview room at the police station. Defendant was not handcuffed and the door was not locked, but it was closed. The detectives questioned defendant for 15 to 20 minutes without giving him *Miranda* warnings. Detective Bautista did not arrange for a youth officer to be present because it is not "common practice" for a youth officer to be present when a juvenile witness is being questioned. During this questioning, defendant provided the name of a certain individual. The detectives advised defendant that they had to verify the information he provided and continue investigating. Before they left to do so, defendant was offered food. He was also advised that he should knock on the door if

he needed anything. Detective Bautista explained that witnesses at the police station are generally not allowed to walk around freely. It is "procedure" for witnesses to be escorted by police personnel if they need to use the bathroom or any other services. According to Detective Bautista, the door to the interview room was closed when he left to investigate, but remained unlocked. Defendant was not handcuffed. At this time, it was Detective Bautista's belief that defendant was not arrested and was free to leave the station. However, defendant was never told that he was free to go and did not ask.

Detective Bautista and Detective Keane returned to the police station about two hours after they initially questioned defendant. Detective Bautista did not check on defendant, but he believed Detective Keane looked in on him. Detective Bautista indicated that at some point in the afternoon, a female called the police station to inquire about defendant. The female asked if defendant was "okay" and Detective Bautista responded that defendant was fine, that they were still investigating, and that it would be a while because they had to speak to a lot of people. Detective Bautista stated that the female caller did not say that defendant's family wanted to come to the police station. Detective Bautista did not refuse to provide the caller with information regarding defendant's whereabouts. Detective Bautista was asked: "Did you ever tell them that you were just going to ask defendant some questions and then bring him home?" He replied: "I never said that."

Sometime before 6 p.m., Jose Leal was interviewed at the police station by Detectives Bautista and Keane and gave a statement implicating himself, defendant, and William Andrade in the murder. Leal was placed under arrest. At 6 p.m., the detectives reinterviewed defendant without providing *Miranda* warnings. Detective Bautista testified that, even after Leal's statement, he did not feel that it was necessary to give defendant *Miranda* warnings because they still considered him a witness. However, Detective Bautista admitted that defendant would have likely been restrained if he tried to leave the police station at that time. After being confronted with Leal's admission, defendant made an oral statement implicating himself in the crime. The detectives did not question defendant while he was giving the statement; defendant "just kept talking." Defendant was then given *Miranda* warnings and juvenile warnings, and the interview was terminated. Detective Bautista testified that defendant was advised that his parents would be contacted. Detective Bautista denied that he returned to defendant's house at that time, or any time after 12 p.m. that day.

Detective Keane's testimony was substantially the same as that of Detective Bautista. Detective Keane stated that they went to defendant's apartment on July 21, 1998, because they believed he was a "possible witness" to the crime. Defendant's mother responded to their knock on the door. Detective Bautista introduced himself and Detective Keane to Garcia and she allowed them into her home by leaving the door open

and stepping aside. Detective Keane heard Garcia call defendant's name and then walk into another room in the apartment. She emerged with defendant behind her. Detective Bautista spoke to defendant in English and explained that they were investigating a homicide and they wanted him to go to Harrison and Kedzie to talk. No one told defendant that they wanted to talk to him about gangs. Detective Keane stated that he never spoke to defendant in the apartment. He only spoke to defendant's sister, who was also present. Defendant agreed to go to the police station. Detective Keane did not tell defendant that he did not have to go or that he could find his own transportation, and defendant did not ask. Detective Keane did not ask defendant if he wanted someone to accompany him to the police station, and defendant did not indicate that he did not want to go alone.

Detective Bautista continued to talk to defendant's mother and handed her a business card. Detective Keane heard Detective Bautista say the words "Harrison and Kedzie," but he did not understand the rest of the conversation because it was in Spanish. When the conversation with defendant's mother was completed, Detective Keane walked out the door and down the stairs with defendant following him. Detective Bautista walked behind defendant. Defendant was not handcuffed and the detectives did not touch him. Detective Keane stated that he and Detective Bautista went to defendant's apartment alone, and he was not aware of any other officers being in the area. Detective Keane added that he did not return to defendant's apartment at any time that day.

After hearing this evidence, the trial court denied defendant's motion to quash arrest, finding that defendant voluntarily accompanied police officers to the station for questioning and was not seized until he was placed under arrest after the 6 p.m. statement. The trial court's discussion of the facts demonstrated that the court found the testimony of the police officers to be more credible than that of defendant and the witnesses he presented. The matter was continued for a hearing on defendant's motion to suppress his oral and handwritten statements. At that hearing, the parties stipulated to the evidence presented at the hearing on defendant's motion to quash arrest and presented the following additional evidence.

Detective Keane testified that he and his partner, Detective Bautista, went to defendant's apartment on July 21, 1998, after learning that Jose Leal gave a written statement indicating that "Chucky," identified as William Andrade, and "Biggie," identified as defendant, told Leal that they were going to rob and kill the victim and that he would get some of the proceeds of their crime. Detective Keane and Detective Bautista brought defendant to the police station and told him about the information they had received from Leal. They did not share this information with defendant at his home or discuss it with his mother prior to bringing him to the police station. Detective Keane stated that they did not advise defendant of his *Miranda* rights when relaying this information to him because "[h]e was not a suspect in the homicide." Defendant denied that he was involved and directed the detectives

to other people who had information about the crime. Detectives Keane and Bautista advised defendant that they were going to the area where the crime was committed to locate and interview other witnesses. Defendant "said it was fine. He would wait there." They left defendant in an interview room.

In the course of their continued investigation, the detectives reinterviewed Leal, and he admitted his own involvement in the crime. Leal also implicated defendant and "Chucky" again. Specifically, Leal stated that he was in the victim's apartment looking for money while defendant and "Chucky" "dealt" with Hector. Leal added that they all ran out of the apartment after "Chucky" stabbed Hector. Leal was arrested after making this statement.

At approximately 6 p.m., defendant was confronted with Leal's statement. Defendant was not given *Miranda* warnings. Detective Keane explained that he and Detective Bautista did not give defendant *Miranda* warnings because they were not sure of defendant's involvement in the crime. "Jose Leal had now given us 3 different statements about what happened, so we really weren't sure if Mariano *** had anything to do with anything at that point. We were still conducting our investigation, so we did not advise him of his rights because he was not under arrest at that time." Detective Keane reiterated later in his testimony that they did not feel they had probable cause to arrest defendant based on Leal's statement alone, and they had no other evidence of defendant's involvement when they spoke

to defendant at 6 p.m. Detective Keane expressly denied withholding *Miranda* warnings in order to get a confession from defendant. Specifically, defense counsel asked, "You didn't do that [arrest defendant] because you wanted to get information out of him before you felt that you had to advise him of his rights, didn't you?" Detective Keane responded, "No." Detective Keane explained that after obtaining Leal's confession, he and his partner "just went in and we told him [defendant]—we spoke to Leal, we talked to several other people and we asked him [defendant]—we wanted to know whether he was involved in this incident or not."

In a brief statement, defendant admitted that he was involved in the murder. According to Detective Keane, defendant stated, in summary, that he went into Hector's apartment, that Hector was bound up and stabbed, and that he left the apartment with "those two [Leal and Chucky]" and "proceeds." After defendant's admission, the detectives terminated the interview, read defendant his *Miranda* rights, and contacted defendant's parents and the State's Attorney's office. The assistant State's Attorney, Steven Fine, arrived sometime after 8 p.m. and began reviewing the case, but did not speak to defendant. Detectives Keane and Bautista likewise did not speak to defendant during that time.

Defendant's father arrived at the police station approximately 30 minutes after Fine. Detective Velez, who is Spanish-speaking, spoke to Lopez and directed him to the room where defendant was seated. Detective

Keane explained that when defendant's father arrived he was allowed to speak privately with defendant. At approximately 9:15 p.m., defendant was interviewed by Assistant State's Attorney Fine and was given *Miranda* warnings. Defendant's father was present for the interview, and Detective Velez served as his translator. Detective Keane was also in the room.

Detective Keane stated that Fine introduced himself to defendant and gave him *Miranda* warnings. Defendant agreed to waive those rights and speak with Fine. Fine spoke to defendant in English, and the entire conversation with Fine was translated in Spanish for defendant's father. The process was lengthy because Fine had to pause after every sentence for Detective Velez to repeat the comments in Spanish for defendant's father. After Fine wrote down defendant's statement,[3] it was reviewed by defendant and his father. Defendant demonstrated that he could read English by reading a portion of the statement aloud. Changes made to the document were initialed by everyone in the room. Detective Keane noted that Fine had spelled defendant's name incorrectly throughout the document, so there were several corrections that were initialed by all the parties present, including defendant's father. Detective Keane denied telling defendant that he would be free to leave the police station after he signed the statement.

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3. Defendant's handwritten statement was not included in the record.

Detective Keane was asked why a youth officer was not notified in this case. He explained:

> "Well, up until the point where he implicated himself, we were just interviewing him. We needed facts and we were trying to talk to him about what he knew or what he didn't know. And he was providing some facts to us. And once he implicated himself, it was terminated and we felt that the parent would have been the best first person to have in that room with him."

Detective Carlos Velez testified that he was contacted by Detective Keane on July 21, 1998, at approximately 8:30 p.m., and asked to translate for defendant's parent. Detective Velez went to the interview room and met with Detective Keane, defendant, defendant's father, and Fine. Detective Velez spoke to Lopez, who stated that he could understand English, but preferred to speak in Spanish. Detective Velez translated for Lopez while defendant was advised of his rights. Lopez did not ask any questions regarding those rights. Detective Velez translated defendant's handwritten statement, which was read aloud by Fine, and translated while defendant made changes to the document. Detective Velez signed the document, as did all the other parties who were present, including defendant's father. Detective Velez did not hear Detective Keane tell defendant he could leave if he signed the statement.

Appendix A

Defendant testified, as he had previously, that he was placed in an interview room when he was brought to the police station. The door to the room was locked with a slide lock that was located on the outside of the door. Defendant stated that he tried to get out of the room but was unable to do so because he was locked in. Defendant initially testified that he was allowed to use the bathroom while at the police station. He later stated that he was not allowed to use the bathroom.

Defendant was asked if he knew what a State's Attorney was, and he replied that he did not. He likewise did not know what a State's Attorney was when his statement was taken. The State's Attorney advised defendant of his rights, but defendant did not understand them. He had never been advised of his rights before that time. He did not tell the State's Attorney that he did not understand.

Defendant testified that his father was not in the room when his handwritten statement was taken. There was a man writing things down and two detectives. The detectives asked defendant questions and he answered them. He did this because the detectives told him he was not leaving the room until he said something, and he believed he could go home if he answered the questions. Defendant stated that he lied to the man writing the statement because he wanted to go home. Defendant indicated that the man writing the statement only read certain sections to him and defendant never reviewed the statement himself. He did admit, however, that he was allowed to make any changes to the

statement that he felt were necessary and that he did, in fact, make changes and initial them.

Defendant testified that he did not see his father prior to signing the statement and his father was not present when the statement was signed. Ten minutes after defendant signed the paper, his father came into the room. A police officer gave the paper to defendant's father and directed him to sign it. Defendant could not recall which police officer gave the paper to his father.

Defendant's father testified, as he had previously, that he went to two police stations to find his son on July 28, 1998. When he returned home, his daughter told him that police were coming to the apartment to look for evidence related to a burglary. The police came and searched, but did not find anything. Lopez was taken to the police station by officers who searched his apartment. When he got there, he was immediately taken to a room. He was given papers to sign "right away." He signed them because he believed that they were papers authorizing defendant's release. Lopez explained that he believed defendant was going to be released because the police found no evidence related to a burglary in his apartment. He never had an opportunity to speak to his son privately and was never advised that his son was being charged with murder. He did not review the papers before he signed them and no one read or explained them to him. Further, no one spoke to him in Spanish. Lopez testified that he was not present when the documents were prepared. He did not see anyone ask defendant questions and then write

out the answers. Defendant was present in the room when Lopez signed the documents. Two police officers were present as well, one of whom had searched Lopez's apartment and drove Lopez to the police station. One of the men told Lopez to sign the document and showed him where to initial.

In rebuttal, Fine testified that he went to the police station on July 21, 1998, sometime after 7 p.m. He waited for defendant's father to arrive before speaking to defendant. After defendant's father arrived, Fine went into the interview room with Lopez, Detective Keane, and Detective Velez, who acted as Lopez's interpreter. Fine testified that he advised defendant of his *Miranda* rights. Defendant stated that he understood them and did not ask any questions. Defendant agreed to speak with Fine and made an oral statement. After the oral statement, Fine told defendant that he wanted to memorialize the statement and explained that the statement could be taken by a court reporter, videotaped, or handwritten by Fine. Defendant chose to give a handwritten statement. Defendant's father was present while the handwritten statement was taken. When the statement was completed, defendant read the preprinted portion of the form aloud to demonstrate his competence in English. Fine then read the entire handwritten portion of the statement aloud. Detective Velez interpreted for Lopez while Fine read. Corrections were made to the statement and initialed by everyone present. When the statement was complete, all the parties signed the statement, including Lopez.

After hearing this evidence, the trial court granted defendant's motion to suppress with respect to the 6 p.m. oral statement made after defendant was confronted with Leal's admission. The court found that the detectives had probable cause to arrest defendant after obtaining Leal's confession and should have advised defendant of his rights and called his parents before questioning him.

With respect to defendant's handwritten statement, the court found that the testimony of defendant and his father was incredible and that the statement was voluntarily given. The court also concluded that there was attenuation between the oral and written statements. The court made this determination without conducting an attenuation hearing, finding that there was sufficient evidence presented at the suppression hearing to make this judgment. The trial court denied defendant's motion to suppress the handwritten statement. Defendant's motions to reconsider the court's rulings were denied.

The matter proceeded to a bench trial. The parties stipulated to testimony taken at Leal's trial from Officer Tamara Block, Officer Daniel Principato, a forensic investigator, and Cynthia Engleking-Prus, a forensic scientist. Officer Block testified that she was the first officer to enter the victim's apartment and observe the murder scene. She noticed that the apartment smelled of gas, which seemed to be emanating from the stove. Upon entering the living room, she saw that the victim was lying on his stomach in a pool of blood with his hands,

feet, and head bound with duct tape. He had been stabbed multiple times. Officer Principato testified that he inventoried certain evidence, including four Corona beer bottles, taken from the scene. Cynthia Engleking-Prus testified that Leal's fingerprint was found on a Corona beer bottle inventoried at the crime scene, and William Andrade's fingerprint was found on duct tape removed from the victim's body.

The main evidence presented by the State against defendant was defendant's handwritten statement. In that statement, defendant stated that he was 15 years old, was in his third year of high school, and could read and write English. Defendant then explained that he saw his friend, Leal, at the St. Paul's Catholic Church festival on July 12, 1998. Leal asked defendant if he wanted to rob a man with whom Leal worked who was "flashing money" at the festival. Leal cautioned that they would have to kill the man after they robbed him because the man knew Leal. The following day, defendant saw Leal and "Chucky" (William Andrade) and Leal asked defendant again if he wanted to be a part of the robbery. Leal then took defendant and Chucky to the victim's apartment. The group waited until it was dark and then knocked on the victim's door. The victim answered and Leal asked him if he could borrow two movies. Leal then pushed the door open and walked in with defendant and Chucky following. Leal and Chucky grabbed the victim and Leal duct taped his hands and ankles while Chucky held him down. The victim was lying on his stomach. Leal eventually went into the kitchen, got a knife, and stabbed the victim "sideways" until he stopped moving.

While the stabbing occurred, defendant looked for money and found the victim's wallet. Leal also looked for items to steal and found some jewelry, which he put in his pocket. Chucky took a camera. Defendant found some stereo equipment and carried it toward the door. Defendant left the stereo equipment in the apartment because individuals in another apartment were "banging" and complaining about the noise. Before they left the apartment, Leal turned the gas on the stove but there was no flame. Defendant, Leal, and Chucky ran out of the apartment. When they were a few blocks away, defendant gave the wallet to Leal and ran home. A few days later, Leal called defendant and invited him to a movie. Leal stated he would treat because he had $ 200.

Defendant was found guilty and was sentenced to a total of 23 years in prison. On appeal, defendant asserted that the trial court erred in denying his motion to quash arrest because he was unlawfully seized from his apartment without probable cause in violation of the fourth amendment. The appellate court rejected this claim, finding that defendant voluntarily accompanied the police for questioning. 367 Ill. App. 3d at 822-23. Defendant also asserted that his statement should have been suppressed because the police violated his fifth amendment rights when they engaged in an unlawful "question first, warn later" interrogation technique. The appellate court rejected this claim as well, finding that there was no evidence that the detectives intentionally withheld *Miranda* warnings in order to secure a confession from defendant. 367 Ill. App. 3d at 825. Defendant now appeals the appellate court's judgment.

Appendix A

ANALYSIS

Defendant calls upon this court to review the judgments of the lower courts with respect to his motions to quash arrest and suppress his handwritten statement. Defendant, however, has failed to include these motions in the record before us on appeal in contravention of Supreme Court Rule 321 (155 Ill. 2d R. 321). We note that the appellant bears the burden of providing a reviewing court with a complete record sufficient to support his claims of error, and any doubts that arise from the incompleteness of the record will be resolved against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958, 76 Ill. Dec. 823 (1984).

Defendant asserts that the appellate court ignored its own well-established precedent when it affirmed the trial court's denial of defendant's motion to quash arrest. In support, defendant points to *People v. Vega*, 203 Ill. App. 3d 33, 560 N.E.2d 983, 148 Ill. Dec. 386 (1990), *People v. Armstrong*, 318 Ill. App. 3d 607, 743 N.E.2d 215, 252 Ill. Dec. 641 (2000), and *In re J.W.*, 274 Ill. App. 3d 951, 654 N.E.2d 517, 211 Ill. Dec. 55 (1995). Defendant maintains that the same facts that guided the appellate court's judgment in those cases are present here, and argues that the facts of the instant case are even more compelling. The State counters that the evidence in this case shows that defendant voluntarily accompanied the officers to the police station and that none of the procedures normally associated with an arrest were present. The State also contends that the cases cited by defendant in support of his position are readily

distinguishable. Neither party asserts that the police had probable cause to arrest defendant at his apartment.

When reviewing a motion to suppress evidence, we defer to the trial court's factual findings, and we will reverse those findings only if they are against the manifest weight of the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 196-97, 860 N.E.2d 178, 307 Ill. Dec. 524 (2006). In this case, the trial court found that the defense witnesses did not present credible testimony. The appellate court upheld this decision, finding that it was not against the manifest weight of the evidence. 367 Ill. App. 3d at 823.

Defendant does not ask this court to review the trial court's factual findings for manifest error. In fact, at oral argument, defendant specifically stated that no credibility contest existed in this case. Defendant made clear that he accepted the appellate court's conclusion that the trial court's credibility assessments were not manifestly erroneous. Accordingly, we review defendant's claims of error with deference to the fact determinations of the trial court.

The first question before this court is a legal one—whether defendant was unlawfully seized under the fourth amendment. We review this issue *de novo*. *Sutherland*, 223 Ill. 2d at 197; *Sorenson*, 196 Ill. 2d at 431.

Appendix A

The fourth amendment to the United States Constitution and article I, section 6, of the Illinois Constitution protect citizens from unreasonable searches and seizures by the government. U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, §6; *People v. Lee*, 214 Ill. 2d 476, 484, 828 N.E.2d 237, 293 Ill. Dec. 267 (2005). Seizure occurs when, by means of physical force or a show of authority, a person's freedom of movement is restrained. *United States v. Mendenhall*, 446 U.S. 544, 553, 64 L. Ed. 2d 497, 509, 100 S. Ct. 1870, 1877 (1980); *People v. Bunch*, 207 Ill. 2d 7, 18, 796 N.E.2d 1024, 277 Ill. Dec. 658 (2003). For purposes of the fourth amendment, a seizure is an arrest. *People v. Melock*, 149 Ill. 2d 423, 436, 599 N.E.2d 941, 174 Ill. Dec. 857 (1992).

"An arrest occurs when the circumstances are such that a reasonable person, innocent of any crime, would conclude that he was not free to leave." *In re D.G.*, 144 Ill. 2d 404, 409, 581 N.E.2d 648, 163 Ill. Dec. 494 (1991). When assessing whether a juvenile was seized for purposes of the fourth amendment, we modify the reasonable person standard to consider whether a reasonable juvenile would have thought that his freedom of movement was restricted. *People v. Braggs*, 209 Ill. 2d 492, 509-11, 810 N.E.2d 472, 284 Ill. Dec. 682 (2004). In *Melock*, we considered several factors when determining whether a reasonable person would not have felt free to leave, such as: the intent of the officer; the understanding of the defendant; whether the defendant was told he was free to leave or that he was under arrest; whether the defendant would have been restrained if he attempted to leave; the length of the

interrogation; and whether *Miranda* warnings were given. *Melock*, 149 Ill. 2d at 437-39. Additionally, courts have considered the number of police officers who sought the defendant; whether the defendant was told he could refuse to accompany the police; whether the defendant was transported to the station in a police car or arranged his own transportation; whether the defendant was placed in an interview room as opposed to a common area; and the method of interrogation. *Armstrong*, 318 Ill. App. 3d at 613; *People v. Williams*, 303 Ill. App. 3d 33, 40, 707 N.E.2d 679, 236 Ill. Dec. 552 (1999); *J.W.*, 274 Ill. App. 3d at 960; *Vega*, 203 Ill. App. 3d at 41-42. When the defendant is a juvenile, courts have also considered the defendant's experience with the criminal justice system and his educational background. *Armstrong*, 318 Ill. App. 3d at 615; *Vega*, 203 Ill. App. 3d at 43.

With these factors in mind, we now consider whether a reasonable juvenile, in defendant's situation, would have believed that he was compelled to accompany detectives to the police station for questioning and whether he would not have felt free to leave once there. The facts show that defendant was 15 years old with no criminal record when two detectives came to his apartment and asked him to accompany them to the police station for questioning in regard to a murder investigation. Defendant's mother was present and did not protest when defendant agreed to go. The detectives gave defendant's mother a contact number and told her that she could accompany her son to the police station if she chose, but her presence was unnecessary.

Appendix A

Defendant left his apartment on his own accord and there was no physical coercion by the detectives. Defendant was not handcuffed, and no guns were drawn. Defendant was escorted to an unmarked police car and sat in the backseat unrestrained. Defendant was not advised that he could decline the detectives' request to accompany them to the station and was not advised that he could arrange his own transportation.

When defendant arrived at the police station, he was placed in an unlocked interrogation room and was questioned for a short time without receiving *Miranda* warnings. Defendant was advised that he was implicated in a murder. Defendant denied involvement and gave the detectives information related to the crime. He was then left alone in the interrogation room so detectives could investigate the information he had provided to them. Defendant was not told that he was free to leave the police station. He was not advised that he could move about the police station without an escort. Instead, he was kept in the interrogation room with the door shut and told to knock on the door if he needed anything. Defendant believed the door to the room was locked, even though the detectives denied locking it. Defendant remained in the interrogation room alone for at least four hours before the detectives returned. During that four-hour period, defendant did not speak to his parents. There is no indication in the record that defendant asked to see or talk to his parents. However, the record demonstrates that a representative of defendant's family was calling the police station during that time to inquire about defendant's status. When the

detectives returned, they confronted defendant with Leal's statements, which implicated defendant in the crime, and the confrontation prompted defendant to confess.

Defendant maintains that, in light of these facts and the appellate court's decisions in *Vega*, *Armstrong*, and *J. W.*, we should conclude that he was unlawfully seized. In *Vega*, police went to the 16-year-old defendant's home and transported him to the police station for questioning. The defendant's mother was present in the home and although she consented to the defendant's accompanying the officers, she questioned why the officers could not speak to the defendant at home. The defendant was not advised that he could refuse to accompany the detectives or arrange his own transportation to the police station. It was uncontested that the police held the defendant by the arm when they escorted him to the police vehicle. When he arrived at the station, the defendant was placed in an interrogation room, questioned, and left alone while detectives investigated further based on information he provided. The detectives testified that they did not believe the defendant's answers to their questions, and further testified that the defendant would have likely been restrained if he tried to leave. The defendant was also pressured to take a polygraph test and was transported to the crime laboratory for testing without his consent. *Vega*, 203 Ill. App. 3d at 42-43. The appellate court concluded that these factors, combined with defendant's age and absence of extensive experience with the criminal justice system, demonstrated that defendant

was unlawfully seized when he was taken from his home. *Vega*, 203 Ill. App. 3d at 43.

In *Armstrong*, police received numerous anonymous calls stating that the defendant was involved in the beating and burning death of the victim. A juvenile officer went to the defendant's home and asked the defendant's guardian if the defendant could accompany her to the police station. The officer told the defendant's guardian that she needed to talk to the defendant, that she would bring him to the station and bring him right back, and if anything else occurred, that she would contact the guardian. The defendant was allowed to accompany the juvenile officer to the police station because the juvenile officer was known and trusted by the defendant's guardian. In fact, the guardian stated that it would be "no problem" for defendant to go to the police station as long as he was with the juvenile officer. At the police station, the defendant was brought to an open lounge, given *Miranda* warnings, and questioned. He admitted involvement in the crime. *Armstrong*, 318 Ill. App. 3d at 610-11. At the time, the defendant was in the ninth grade, was receiving special education, and had not been previously arrested. The appellate court noted that the defendant was the focus of the murder investigation based on anonymous tips. This fact, combined with the defendant's age, lack of previous arrests, educational level, and lack of any communication that he was free to leave, led the appellate court to conclude that the defendant was unlawfully seized. *Armstrong*, 318 Ill. App. 3d at 615.

Finally, in *J.W.*, three police officers went to the 14-year-old defendant's school, where the defendant was in the eighth grade, to question him about a murder. The defendant was called to the principal's office, asked to accompany the officers to the police station, and was only allowed to obtain his belongings with a police escort. The police took the defendant out of school without contacting his mother; they contacted his grandmother who was not his guardian. The defendant rode to the police station in the back of a police car with no door handles and was never told that he did not have to go with the officers or that he was not under arrest. *J.W.*, 274 Ill. App. 3d at 958-60. When the defendant arrived at the police station, he was escorted to an interview room. The door to the interview room was open. The defendant was questioned by four police officers and was confronted with information placing him at the crime scene. When the defendant denied involvement, he was not told he was free to leave. The appellate court noted that the defendant would have been hard-pressed to leave in any event, as he was a 14-year-old with no means of transportation available that would allow him to leave the police station on his own accord. The appellate court concluded that the number of officers present, information known to the officers, method of interrogation, place of questioning and lack of communication that the defendant was free to leave demonstrated that the defendant was unlawfully seized. *J.W.*, 274 Ill. App. 3d at 961.

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While many of the facts present in *Vega*, *Armstrong*, and *J.W.* are present in the instant case, the instant case is still factually distinguishable. In *Vega*, it was uncontested that the defendant's mother specifically asked the officers to question the defendant at home. Further, the officers physically coerced the defendant by taking him by the arm and escorting him out of his home. *Vega*, 203 Ill. App. 3d at 34-35. In *Armstrong*, the facts show that the defendant was the target of the officer's investigation, that the officer misled the defendant and his guardian about the nature of the questioning, and that the defendant was allowed to go with the officer because she was known to defendant's guardian. *Armstrong*, 318 Ill. App. 3d at 610. Finally, in *J.W.*, the defendant was removed from school by three police officers without his mother's knowledge or consent and not allowed to even retrieve his belongings without a police escort. *J.W.*, 274 Ill. App. 3d at 954-55.

Here, defendant was asked, in the presence of his mother and adult sister, to accompany the detectives to the police station for questioning. Both defendant and his mother agreed that he would go. Defendant was not handcuffed, and the evidence deemed credible by the trial court demonstrated that the detectives did not make any threat or show of force which would have led defendant to believe that he was required to accompany them. We acknowledge that defendant was 15-years-old at the time and had no experience with the criminal justice system. However, the facts are clear that defendant's mother was present for defendant's entire at-home interaction with the detectives and she did not

object to defendant's accompanying them to the police station (see *People v. Sneed*, 274 Ill App. 3d 287, 297, 653 N.E.2d 1349, 210 Ill. Dec. 887 (1995) (appellate court considered fact that defendant was asked, and agreed to go to station, with grandmother present as evidence that the defendant voluntarily accompanied the police)), even when fully advised that the detectives wanted to speak to defendant about a murder. The evidence deemed credible by the trial court demonstrated that defendant was not considered a suspect at the time and was not the target of the detective's investigation. There is no indication that the detectives did anything that would suggest that defendant was compelled to accompany them or that the detectives mislead defendant or his mother about the purpose of their interaction with defendant.

The facts of this case are more like those in *People v. McKinney*, 277 Ill. App. 3d 889, 661 N.E.2d 408, 214 Ill. Dec. 554 (1996). In that case, two detectives went to the 17-year-old defendant's home to question her about the death of her baby. The defendant's mother was present when the detectives arrived. After a brief discussion at the defendant's home, the detectives asked the defendant to accompany them to the police station, and defendant agreed. The defendant and her mother were driven to the station in a police car. The defendant was never advised that she did not have to accompany the officers and was never told that she could arrange her own transportation. The defendant maintained that she was told to accompany the detectives in a forceful tone, although this allegation was rebutted. The

defendant cited to *Vega* in support of her assertion that a reasonable person in her position would not have felt free to decline the officers' request. The appellate court disagreed, finding no evidence that the detectives' behavior compelled the defendant to accompany them. The appellate court also noted that it was unlikely that the detectives went to the defendant's home with the intention of arresting her, as the cause of her baby's death was still unknown. The appellate court found that a reasonable juvenile in the defendant's situation would have felt free to decline the detectives' request.

We reach the same conclusion here. Like the juvenile defendant in *McKinney*, defendant was initially approached by the police in the presence of his mother. Defendant agreed to accompany the police and his mother did not protest. At the time defendant made this decision, he was aware that his presence at the police station was required because of the criminal investigation. Further, the evidence suggests that defendant's decision to accompany the police was voluntary and not the result of coercion.

Our analysis does not end there, however, because defendant's initial, voluntary presence at the police station does not negate the possibility that subsequent police conduct was unlawful. See *McKinney*, 277 Ill. App. 3d at 894; *People v. Barlow*, 273 Ill. App. 3d 943, 949, 654 N.E.2d 223, 210 Ill. Dec. 924 (1995). In this case, the facts demonstrate that defendant arrived at the police station at 1 p.m. and was immediately placed in an interview room for questioning. He was interviewed

by two detectives for approximately 20 minutes and was advised during the interview that he had been implicated in the crime. Defendant then provided information about the crime and was told to wait in the interview room while the detectives conducted further investigation. Defendant was not taken out of the interview room and escorted to an open area. He was not permitted to walk around the police station without an escort. Instead, he was left in an interview room with the door shut and told to knock if he needed to use the restroom or required other assistance. The detectives testified the room was unlocked, but defendant believed that he was locked in. Defendant was not advised that he was free to leave even though the detectives testified that defendant would have been permitted to leave at this point if he desired. Defendant remained in the interview room for four hours without contact with his family or any other person interested in his well-being. Defendant's family was calling repeatedly to obtain information about defendant's status, but they were never advised that he was free to leave; only that he was being questioned.

Although defendant did not receive *Miranda* warnings, and no other indicia of formal arrest were present, we cannot conclude that a reasonable juvenile in defendant's position would have felt free to leave the police station. Defendant's voluntary presence at the police station escalated into an involuntary seizure in violation of defendant's fourth amendment rights. See *McKinney*, 277 Ill. App. 3d at 894; *People v. Wallace*, 299 Ill. App. 3d 9, 17-18, 701 N.E.2d 87, 233 Ill. Dec. 444

(1998); *Barlow*, 273 Ill. App. 3d at 950. We recognize that the investigatory function of the police necessitates station-house questioning. See *People v. Wipfler*, 68 Ill. 2d 158, 168, 368 N.E.2d 870, 11 Ill. Dec. 262 (1977). However, we reject "the proposed fiction that a person who voluntarily agrees to submit to interrogation at a police station also implicitly consents to remain in the police station while the police investigate the crime to obtain probable cause for the interviewee's arrest." *Barlow*, 273 Ill. App. 3d at 950; see also *People v. Reynolds*, 257 Ill. App. 3d 792, 801, 629 N.E.2d 559, 196 Ill. Dec. 14 (1994); *People v. Walls*, 220 Ill. App. 3d 564, 579, 581 N.E.2d 264, 163 Ill. Dec. 313 (1991); *People v. Stofer*, 180 Ill. App. 3d 158, 166-68, 534 N.E.2d 1287, 128 Ill. Dec. 682 (1989). This is particularly true when the person in question is a minor.

Our determination that defendant was illegally seized at the police station does not end our analysis. We must now consider whether the handwritten statement, taken after the illegal seizure, was admissible. The State asserts that we should consider whether there was sufficient attenuation between defendant's unlawful arrest and handwritten statement to render that statement admissible. The State includes a caveat, however, arguing that we should only make this consideration if the outcome favors the State. If the outcome will favor defendant, the State urges us to remand the matter for an attenuation hearing. Defendant likewise asserts that, if this court were to reach the issue of attenuation, the matter should be remanded for an attenuation hearing because no such

hearing was conducted below. However, defendant urges this court to first consider whether his handwritten statement should have been suppressed because it was involuntary under the *fifth amendment*.

We are presented with two distinct considerations: first, whether defendant's handwritten statement was voluntary under the fifth amendment protection against self-incrimination, such that defendant understood the *Miranda* warnings and felt that he had a legitimate choice to exercise them, and, second, whether, for fourth amendment purposes, the handwritten statement was sufficiently attenuated to purge the taint of defendant's illegal arrest. *Brown v. Illinois*, 422 U.S. 590, 601-02, 45 L. Ed. 2d 416, 426, 95 S. Ct. 2254, 2260-61 (1975). As the Supreme Court explained in *Dunaway v. New York*, the *fifth amendment* voluntariness requirement is a " 'threshold requirement' " for fourth amendment analysis. *Dunaway*, 442 U.S. 200, 217, 60 L. Ed. 2d 824, 839, 99 S. Ct. 2248, 2259 (1979), quoting *Brown*, 422 U.S. at 604, 45 L. Ed. 2d at 427, 95 S. Ct. at 2262. The fact that an illegally seized defendant ultimately received *Miranda* warnings, waived them, and voluntarily spoke to police does not automatically mean that the causal connection between the illegality and the arrest has been broken for fourth amendment purposes. *Dunaway*, 442 U.S. at 217-18, 60 L. Ed. 2d at 839, 99 S. Ct. at 2259. However, as the United States Supreme Court instructed in *Dunaway*, "if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached." (Emphasis added.) *Dunaway*, 442 U.S. at 217, 60 L. Ed. 2d at 839, 99 S. Ct. at 2259.

Accordingly, we first consider defendant's fifth amendment claim that his handwritten statement was involuntary.

Defendant relies on the Supreme Court's opinion in *Missouri v. Seibert*, 542 U.S. 600, 159 L. Ed. 2d 643, 124 S. Ct. 2601 (2004) (plurality op.), to support his fifth amendment contention. The State counters that defendant misapplies *Seibert* and that suppression of his statement is unwarranted based on the facts of this case. We conclude that defendant's statement was involuntary and should be suppressed.

The fifth amendment protects against involuntary self-incrimination. *People v. Willis*, 215 Ill. 2d 517, 519, 831 N.E.2d 531, 294 Ill. Dec. 581 (2005). In *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), the United States Supreme Court "conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained." *Seibert*, 542 U.S. at 608, 159 L. Ed. 2d at 653, 124 S. Ct. at 2608 (plurality op.). *Miranda* forged a bright-line rule (*People v. Jones*, 219 Ill. 2d 1, 27, 845 N.E.2d 598, 300 Ill. Dec. 709 (2006)); however, the rule is not without exception.

In *Oregon v. Elstad*, 470 U.S. 298, 84 L. Ed. 2d 222, 105 S. Ct. 1285 (1985), the Supreme Court recognized that suppression of all statements obtained after police failed to warn pursuant to *Miranda* was not always

necessary. In that case, police went to the defendant's house with a warrant for his arrest. As defendant was being escorted out, one officer stopped to explain the arrest to his mother. The other officer sat down with the defendant in the living room and asked the defendant questions without advising him of his *Miranda* rights. The defendant made an incriminating statement. *Elstad*, 470 U.S. at 300-01, 84 L. Ed. 2d at 227, 105 S. Ct. at 1288-89. Later, at the police station, defendant was given *Miranda* warnings, waived them, and made a statement. At trial, defendant's prewarning statement was suppressed. The Supreme Court considered whether the postwarning statement should also have been suppressed, and explained: "There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question." *Elstad*, 470 U.S. at 312, 84 L. Ed. 2d at 234, 105 S. Ct. at 1295. The *Elstad* Court then concluded:

> "[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that

> precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." *Elstad*, 470 U.S. at 314, 84 L. Ed. 2d at 235, 105 S. Ct. at 1296.

The Supreme Court revisited *Elstad* in *Seibert*. There, the defendant was arrested for murder and interrogated by police without receiving *Miranda* warnings. After the defendant made an incriminating statement, the police gave her a 20-minute break, turned on a tape recorder, gave her *Miranda* warnings, and obtained a signed waiver of her *Miranda* rights. The interrogating police officer then went on to question the defendant using information the defendant had supplied prior to receiving *Miranda* warnings. *Seibert*, 542 U.S. at 605, 159 L. Ed. 2d at 650-51, 124 S. Ct. at 2606 (plurality op.). The defendant filed motions to suppress both her prewarning and postwarning statements. At the suppression hearing, the interrogating police officer testified that "he made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.'" *Seibert*, 542 U.S. at 605-06, 159 L. Ed. 2d at 651, 124 S. Ct. at 2606 (plurality op.).

In a plurality opinion authored by Justice Souter, the Supreme Court stated that the question first, warn later technique utilized by the officer rendered the

resulting statement inadmissible. *Seibert*, 542 U.S. at 617, 159 L. Ed. 2d at 658, 124 S. Ct. at 2613 (plurality op.). In reaching this conclusion, the plurality declined to apply *Elstad's* test to determine, first, whether the initial, prewarning statement was made without coercion, and then, whether the subsequent statement was given after a knowing waiver of the defendant's rights. *Seibert*, 542 U.S. at 615, 159 L. Ed. 2d at 657, 124 S. Ct. at 2612 (plurality op.). Instead, the plurality limited *Elstad* to its facts, and concluded that it applied where the police officers' failure to warn amounted to "a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally." *Seibert*, 542 U.S. at 615, 159 L. Ed. 2d at 657, 124 S. Ct. at 2612 (plurality op.).

The plurality then created a new test to determine whether warnings delivered after questioning could be effective enough to protect a suspect's rights. The test required consideration of "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Seibert*, 542 U.S. at 615, 159 L. Ed. 2d at 657, 124 S. Ct. at 2612 (plurality op.). Applying this test to the facts before it, the plurality determined that the statements made by the defendant were obtained through a police strategy designed to undermine *Miranda* and were thus

inadmissible. *Seibert*, 542 U.S. at 616, 159 L. Ed. 2d at 657, 124 S. Ct. at 2612 (plurality op.).

Justice Kennedy wrote a concurrence agreeing with the plurality's overall decision that the two-step interrogation technique utilized by the officer was improper. However, Justice Kennedy concluded that the test fashioned by the plurality, which "envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations[,] * * * cuts too broadly." *Seibert*, 542 U.S. at 621-22, 159 L. Ed. 2d at 661, 124 S. Ct. at 2616 (Kennedy, J., concurring). Justice Kennedy proposed a "narrower test applicable only in the infrequent case * * * in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." *Seibert*, 542 U.S. at 622, 159 L. Ed. 2d at 661, 124 S. Ct. at 2616 (Kennedy, J., concurring). Under Justice Kennedy's test, the principles of *Elstad* would govern admission of statements made without the benefit of *Miranda* warnings unless the evidence demonstrated that police officers deliberately employed a question first, warn later interrogation strategy. If that strategy was deliberately used, statements taken after *Miranda* warnings would be excluded unless "curative measures were taken," such as a substantial break in time and circumstances between the statements, that would allow the accused "to distinguish the two contexts and appreciate that the interrogation has taken a new turn." *Seibert*, 542 U.S. at 622, 159 L. Ed. 2d at 661, 124 S. Ct. at 2616 (Kennedy, J., concurring).

Appendix A

The Supreme Court has instructed: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 266, 97 S. Ct. 990, 993 (1977), quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15, 49 L. Ed. 2d 859, 872 n.15, 96 S. Ct. 2909, 2923 n.15 (1976). Most federal circuits, including the Seventh Circuit, have interpreted *Seibert* in accordance with Justice Kennedy's concurrence. *United States v. Carter*, 489 F. 3d 528, 535-36 (2d Cir. 2007); *United States v. Naranjo*, 426 F.3d 221, 231-32 (3d Cir. 2005); *United States v. Mashburn*, 406 F.3d 303, 308-09 (4th Cir. 2005); *United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006); *United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004); *United States v. Ollie*, 442 F.3d 1135, 1142 (8th Cir. 2006); *United States v. Williams*, 435 F.3d 1148, 1157-58 (9th Cir. 2006); but see *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006); see also *United States v. Capers*, No. 06 Cr. 266, 2007 U.S. Dist. LEXIS 25852 (S.D.N.Y. March 29, 2007).

As the Seventh Circuit explained:

> "What emerges from the split opinions in *Seibert* is this: at least as to *deliberate* two-step interrogations in which *Miranda* warnings are intentionally withheld until after the suspect confesses, the central voluntariness inquiry of *Elstad* has been

> replaced by a presumptive rule of exclusion, subject to a multifactor test for change in time, place, and circumstances from the first statement to the second. * * * Where the initial violation of *Miranda* was not part of a deliberate strategy to undermine the warnings, *Elstad* appears to have survived *Seibert*." (Emphasis in original.) *Stewart*, 388 F.3d at 1090.

This court has not previously been asked to apply *Seibert* and, therefore, has not taken a position on which portion of the opinion is controlling. However, after considering the analyses of the federal circuit courts, along with the instruction provided by the Supreme Court in *Marks*, we find that Justice Kennedy's concurrence resolves the case on the narrowest grounds and is therefore controlling authority. We note that our appellate court has recently adopted this interpretation of *Seibert* in *People v. Montgomery*, 375 Ill. App. 3d 1120, 875 N.E.2d 671, 314 Ill. Dec. 698 (2007), and *People v. Loewenstein*, 378 Ill. App. 3d 984, 883 N.E.2d 690, 318 Ill. Dec. 459 (2008); see also *People v. Degorski*, 886 N.E.2d 1070 (2008) (distinguishing *Seibert* on the grounds that the officers in *Degorski* did not intentionally use the question first, warn later interrogation technique); but see *Martinez v. State*, 204 S.W.3d 914 (Tex. App. 2006).

In applying Justice Kennedy's concurrence, we must first determine whether the detectives deliberately used a question first, warn later technique when

interrogating defendant. If there is no evidence to support a finding of deliberateness on the part of the detectives, our *Seibert* analysis ends. If there is evidence to support a finding of deliberateness, then we must consider whether curative measures were taken, such as a substantial break in time and circumstances between the statements, such that the defendant would be able "to distinguish the two contexts and appreciate that the interrogation has taken a new turn." *Seibert*, 542 U.S. at 622, 159 L. Ed. 2d at 661, 124 S. Ct. at 2616 (Kennedy, J., concurring).

We acknowledge, as did the *Seibert* plurality, that police officers will generally not admit on the record that they deliberately withheld *Miranda* warnings from a suspect in order to obtain a confession. *Seibert*, 542 U.S. at 616 n.6, 159 L. Ed. 2d at 657 n.6, 124 S. Ct. at 2612 n.6 (plurality op.). In *Montgomery*, our appellate court made the same observation and found guidance in the Ninth Circuit's opinion in *Williams*, 435 F.3d at 1158-59. *Montgomery*, 375 Ill. App. 3d at 1127. We also find *Williams* to be instructive.

The *Williams* opinion provides an analytical framework for determining whether deliberate misconduct occurred during an interrogation without direct evidence. This framework encompasses the considerations made by Justice Kennedy, as well as the *Seibert* plurality. The *Williams* court instructs: "[I]n determining whether the interrogator deliberately withheld the *Miranda* warning, courts should consider whether objective evidence and any available subjective

evidence such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning." *Williams*, 435 F.3d at 1158. The *Williams* court considered the following factors, originally set forth by the *Seibert* plurality to determine the admissibility of a postwarning statement, as guidelines for assessing evidence objectively: "the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements." *Williams*, 435 F.3d at 1159, citing *Seibert*, 542 U.S. at 615, 159 L. Ed. 2d at 657, 124 S. Ct. at 2612 (plurality op.).

Within this framework, we look to the objective evidence in this case. The 15-year-old defendant was brought to the police station at approximately 1 p.m. and placed in an interrogation room. Detectives questioned him at that time and advised him that Leal had implicated him in Hector's murder. Defendant provided the detectives with information and was left alone in the same room, with the door closed, for four to five hours while detectives continued to investigate. Defendant was not handcuffed during this period and the door to the interview room remained unlocked. However, defendant's freedom of movement was restricted, as he was not allowed to leave the room without an escort and was never told that he was free to leave the police station.

At 6 p.m., the detectives who initially brought defendant to the station, questioned him, and left him in the interview room returned to that same interview room and spoke to defendant again. They told defendant that Leal had admitted to participating in Hector's murder and that Leal had implicated him. At this time, defendant was aware that Leal had now implicated him twice in this crime, and that Leal had confessed. Without providing *Miranda* warnings, the detectives asked defendant "whether he was involved in this incident or not." Defendant answered by giving an incriminating oral statement. Detective Bautista testified that defendant was not questioned while he gave the statement, he "just kept talking." After defendant confessed, the detectives stopped questioning him, gave him his *Miranda* warnings, and terminated the interview.

Looking at the subjective evidence, we note that Detective Keane explicitly denied using the "question first, warn later" technique when asked directly by defense counsel. Detective Keane explained that he and Detective Bautista did not give defendant *Miranda* warnings before confronting him with Leal's evening statement because, despite Leal's incriminating admission and implication of defendant, they were still not certain that defendant had a role in the commission of the crime and did not consider him a suspect. Nevertheless, Detective Keane testified that defendant would likely not have been free to leave the police station at that point if he attempted to do so.

Appendix A

The objective and subjective evidence available to this court, when viewed in its totality, supports an inference that the detectives engaged in some form of the "question first, warn later" interrogation technique when they confronted defendant at 6 p.m. with Leal's statement and obtained defendant's oral confession. The uncontested facts demonstrate that Leal was taken into custody after implicating defendant and confessing to his own part in the crime. If Leal's statement was sufficient to elevate his status from that of a witness to a suspect, we presume it had the same effect on defendant's status. We acknowledge that Detective Keane testified otherwise, stating that defendant was still considered a witness after Leal's incriminating statement. We also acknowledge that the trial court found Detective Keane's testimony to be credible overall, and defendant does not challenge the trial court's credibility assessment as being against the manifest weight of the evidence.

However, the record demonstrates a contradiction in Detective Keane's testimony which the trial court did not specifically address and we cannot ignore. Although Detective Keane claimed that defendant was not a suspect, he nevertheless testified that defendant would not have been free to leave the police station at 6 p.m. after Leal's incriminating statement had been obtained. In light of these facts, we can think of no legitimate reason why the detectives failed to give defendant his *Miranda* warnings prior to the 6 p.m. confrontation, other than a deliberate decision to circumvent *Miranda* in hopes of obtaining a confession, which would ultimately lead to a handwritten statement.

Appendix A

In his concurrence in *Seibert*, Justice Kennedy discussed situations where an officer might mistakenly withhold *Miranda* warnings, and pointed out that mistakes of this sort could not be considered deliberate. "An officer may not realize that a suspect is in custody and warnings are required. The officer may not plan to question the suspect or may be waiting for a more appropriate time." *Seibert*, 542 U.S. at 620, 159 L. Ed. 2d at 660, 124 S. Ct. at 2615 (Kennedy, J., concurring). We do not believe that the detectives in this case made such a mistake. The detectives were clearly interrogating defendant, as they confronted him with Leal's statement and pointedly asked him if he was involved in the crime. Moreover, it was plain that defendant was in custody, as Detective Keane testified that defendant would not have been free to leave the police station at that time. We find that the objective and subjective evidence present in the record supports an inference that detectives deliberately withheld *Miranda* warnings from defendant.

Having reached this conclusion, we must now consider whether defendant's handwritten statement [66] is nevertheless admissible. The relevant question is whether, after receiving midstream *Miranda* warnings, a reasonable person, in defendant's situation, would have understood that he retained a choice about continuing to talk to police. *Seibert*, 542 U.S. at 617, 159 L. Ed. 2d at 658, 124 S. Ct. at 2613 (plurality op.); *Seibert*, 542 U.S. at 622, 159 L. Ed. 2d at 661, 124 S. Ct. at 2616 (Kennedy, J., concurring). On this point, the analyses of the plurality, and Justice Kennedy's

concurrence, merge. See *Stewart*, 388 F.3d at 1091. The plurality looked to the passage of time between the unwarned and warned statements, the location where those statements were taken, whether the same person questioned the suspect during the unwarned and warned statements, whether details obtained during the unwarned phase were used during the warned phase, and whether the suspect was advised that the unwarned statement could not be used against the suspect. *Seibert*, 542 U.S. at 616, 159 L. Ed. 2d at 657-58, 124 S. Ct. at 2612 (plurality op.). The plurality also considered whether "[i]t would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before." *Seibert*, 542 U.S. at 616-17, 159 L. Ed. 2d at 658, 124 S. Ct. at 2613 (plurality op.).

Justice Kennedy's concurrence similarly instructed:

> "[P]ostwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may

> suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn. [Citations.] Alternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient." *Seibert*, 542 U.S. at 622, 159 L. Ed. 2d at 661, 124 S. Ct. at 2616 (Kennedy, J., concurring).

The facts of this case demonstrate that sometime after 8 p.m., about two hours after defendant's oral confession, defendant's father arrived at the police station. He was permitted to speak to defendant alone. Shortly thereafter, the assistant State's Attorney met with defendant, advised him of his *Miranda* rights, and obtained defendant's handwritten statement in the presence of defendant's father, Detective Keane, and Detective Velez, who acted as an interpreter. This meeting took place in the same interview room in which defendant had spent the day. Defendant was not advised that his oral statement could not be used against him.

We recognize that defendant's handwritten statement was taken after defendant received *Miranda* warnings at least twice, that an assistant State's Attorney was doing the questioning rather than a detective, and that defendant's father was present. However, the unwarned and warned statements were taken close in time, in the same place, with Detective Keane present for both, and defendant was never advised that his oral statement would be inadmissible.

Viewing all the relevant factors, we cannot conclude that a reasonable juvenile in defendant's position would have understood that he had a genuine choice about whether to continue talking to the police. We find that defendant's handwritten statement was involuntary for fifth amendment purposes pursuant to the United States Supreme Court's decision in *Seibert.* Defendant's handwritten statement should have been suppressed.

Having reached this conclusion, we need not conduct an attenuation analysis to determine whether defendant's confession was obtained through exploitation of his illegal arrest under the *fourth amendment.* "Indeed, if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached." (Emphases added.) *Dunaway*, 442 U.S. at 217, 60 L. Ed. 2d at 839, 99 S. Ct. at 2259.

We are bound, however, to consider the double jeopardy implications of our finding that defendant's handwritten statement is inadmissible. Defendant does not raise any claims concerning the sufficiency of the evidence against him and did not assert that his conviction should be vacated outright because the State did not meet its burden at trial. Instead, defendant seeks reversal of his conviction and remand for a new trial. Retrial, however, raises double jeopardy concerns, and we are therefore required to consider the sufficiency of the evidence against defendant. *People v. Garner*, 147 Ill. 2d 467, 483, 590 N.E.2d 470, 168 Ill. Dec. 833 (1992).

Appendix A

The *double jeopardy clause* prohibits retrial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to present in the first proceeding. *Burks v. United States*, 437 U.S. 1, 11, 57 L. Ed. 2d 1, 9, 98 S. Ct. 2141, 2147 (1978). It does not, however, preclude retrial where a conviction has been set aside because of an error in the proceedings leading to the conviction. *People v. Mink*, 141 Ill. 2d 163, 173-74, 565 N.E.2d 975, 152 Ill. Dec. 293 (1990). The State cannot retry a defendant once it has been determined that the evidence introduced at trial was insufficient to sustain a conviction. *Mink*, 141 Ill. 2d at 173-74. Yet, "retrial is permitted even though evidence is insufficient to sustain a verdict once erroneously admitted evidence has been discounted, and for the purposes of double jeopardy all evidence submitted at the original trial may be considered when determining the sufficiency of the evidence." *People v. Olivera*, 164 Ill. 2d 382, 393, 647 N.E.2d 926, 207 Ill. Dec. 433 (1995), citing *Lockhart v. Nelson*, 488 U.S. 33, 40, 102 L. Ed. 2d 265, 273, 109 S. Ct. 285, 290 (1988).

In this case, defendant's conviction was set aside because of trial error. Accordingly, we consider whether the evidence presented at trial, including the now-suppressed handwritten statement, was sufficient to convict. *Olivera*, 164 Ill. 2d at 393. The relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Olivera*, 164 Ill. 2d at 396.

Appendix A

At trial, the State presented the testimony of Officer Block, who described the murder scene. She stated that the apartment smelled of gas, which seemed to be coming from the stove. She added that the victim was lying on his stomach on the living room floor. He had been stabbed multiple times and his head, feet, and hands were bound with duct tape. Additional evidence was presented which demonstrated that Leal's fingerprint was found on a beer bottle in the victim's apartment and that Andrade's fingerprint was found on duct tape removed from the victim's body. There was no physical evidence linking defendant to the crime. The primary evidence against defendant was his handwritten statement, where he admitted to his participation in the crime and provided specific details that corroborated the evidence obtained at the crime scene. For example, defendant stated that the victim's hands and ankles were bound with duct tape, that Andrade held the victim down, and that the victim was stabbed while lying on his stomach. Defendant added that Leal turned the gas on the stove before leaving the apartment, but there was no flame.

Viewing the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found defendant guilty beyond a reasonable doubt based on his written confession, which was corroborated by physical evidence and observations made at the crime scene. Accordingly, we conclude that there is no double jeopardy impediment to retrial, and thus remand the cause to the circuit court for that purpose.

Appendix A

CONCLUSION

For the reasons above, we conclude that the appellate court erred in upholding the trial court's denial of defendant's motions to quash and suppress. The judgments of the trial and appellate courts are reversed. Defendant's conviction is vacated. The cause is remanded to the circuit court for a new trial.

Reversed and remanded.

CONCUR BY: JUSTICE FREEMAN

CONCUR

JUSTICE FREEMAN, specially concurring:

In its opinion, the majority holds that the 15-year-old defendant was unlawfully seized during his questioning at the police station in violation of his rights under the fourth amendment. The majority further holds that the handwritten statement made by defendant at the police station was involuntary under the fifth amendment and should therefore be suppressed. I am in agreement with both of these holdings of the majority, as well as with its remand of this cause to the circuit court for a new trial.

I write separately, however, because I part company with the majority with respect to its holding earlier in its opinion that defendant's decision to accompany the Chicago police detectives to the police station was

"voluntary and not the result of coercion." Slip op. at 24. The majority holds that defendant was not unlawfully seized when he accompanied Detectives Bautista and Keene from his apartment to the police station for questioning in the murder of Hector Andradae. Although the majority states that it is appropriately modifying the reasonable person standard to inquire whether, under the facts presented, a reasonable juvenile would have believed that his freedom of movement was restricted by the detectives (slip op. at 19), it appears that it is nevertheless applying the test of a reasonable adult—rather than that of a reasonable juvenile—in determining that defendant believed that he was free to terminate the encounter with the officers.

A seizure occurs within the meaning of the fourth amendment when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509, 100 S. Ct. 1870, 1877 (1980). As the majority notes, this court has previously set forth several pertinent factors that may be considered when determining whether a reasonable person would have felt free to leave the presence of police officers, including: the intent of the officer; the understanding of the defendant; whether the defendant was told he was free to leave or that he was under arrest; whether the defendant would have been restrained if he attempted to leave; the length of the interrogation; and whether *Miranda* warnings were given. *People v.*

Melock, 149 Ill. 2d 423, 437-39, 599 N.E.2d 941, 174 Ill. Dec. 857 (1992). In addition, courts have also looked to whether the defendant was told he could refuse to accompany the police; the number of police officers who sought the defendant; whether the defendant was transported to the station in a police car or arranged his own transportation; whether the defendant was placed in an interview room as opposed to a common area; and the method of interrogation. *People v. Armstrong*, 318 Ill. App. 3d 607, 613, 743 N.E.2d 215, 252 Ill. Dec. 641 (2000); *People v. Williams*, 303 Ill. App. 3d 33, 40, 707 N.E.2d 679, 236 Ill. Dec. 552 (1999); *In re J.W.*, 274 Ill. App. 3d 951, 960, 654 N.E.2d 517, 211 Ill. Dec. 55 (1995); *People v. Vega*, 203 Ill. App. 3d 33, 41-42, 560 N.E.2d 983, 148 Ill. Dec. 386 (1990).

When the defendant is a juvenile—as in the matter before us—we modify the reasonable person inquiry to ask what a reasonable *juvenile* would have believed in defendant's position. *People v. Braggs*, 209 Ill. 2d 492, 509-11, 810 N.E.2d 472, 284 Ill. Dec. 682 (2003). In *Braggs*, we held that this approach is animated by the firmly established legal principle that, in general, juvenile defendants are more susceptible to police coercion than adults and are likewise more susceptible to the impression that they are, in fact, in custody and unable to leave the presence of the officers. *Braggs*, 209 Ill. 2d at 508-09. The fact that a defendant is a juvenile has also led courts to consider the defendant's experience with the criminal justice system and his educational background in determining whether a reasonable juvenile would have felt free to leave.

Armstrong, 318 Ill. App. 3d at 615; *Vega*, 203 Ill. App. 3d at 43.

Defendant asserts that he was placed under arrest—and therefore seized within the meaning of the fourth amendment—at the time that he was escorted by Detectives Bautista and Keane from his apartment to the police station, as a reasonable juvenile in his position would have perceived that he was unable to terminate the encounter with the officers and leave their presence. Defendant further contends that this seizure was illegal because, by the very admission of the State, the officers had no probable cause upon which to make an arrest of defendant at that time. I agree.

The test to be applied here is one of ordinary common sense: would a reasonable juvenile in defendant's position—with no prior contact with the legal system—have felt free to simply end the encounter with the officers when they came to his apartment? Would a reasonable juvenile placed within such a situation believe that he—rather than the detectives—was in control of the situation to the extent he was free to leave? The majority holds that he would have, but I cannot agree with this conclusion based upon the following facts.

First, defendant was not questioned briefly when he was found in his home by Detectives Bautista and Keane, even though both detectives testified that they considered defendant to be simply a "witness" in the investigation, and even though the record reveals that

only defendant and Jose Leal were brought to the police station for questioning while other witnesses in the case were questioned outside of the station. By Bautista's own testimony he told defendant "that his name had been mentioned by other people that we had talked to; that we needed to—or wanted to ask him some questions. I told him that I would prefer to ask him the questions at the Area 4 detective division, if he would come along with us." Bautista indicated a strong desire to "have the interview be conducted at Area 4" and admitted that he neither offered defendant the alternative of traveling to the police station by his own means nor told defendant that he could refuse to accompany the officers. The specter of having two detectives arrive at one's dwelling admittedly intent on transporting that person to a police station in a squad car for questioning without offering an alternate means of transportation or acknowledging that the person need not comply is inherently intimidating to a juvenile who had no previous experience with the police, and who, common sense dictates, may be more susceptible to complying with requests made by authority figures such as police officers.

Further, by Bautista's own testimony, when defendant left his apartment to go with the officers, "Detective Keane led the way down the stairs. The defendant was behind him, and I was behind the defendant." It is reasonable to believe a juvenile surrounded by officers from front and back would not feel in control and would not believe that he could simply end the encounter and refuse to accompany the

detectives. Defendant was then seated alone in the back of the detective's unmarked squad car, and, according to Bautista, no conversation ensued between the time they left defendant's apartment and the time they arrived at the police station. Although defendant was not handcuffed, the totality of the circumstances made it unlikely that he would have felt free to leave the officers and return home.

It is my view that where a juvenile is involved, a court must be extra-vigilant in examining whether or not that juvenile would reasonably perceive that he or she would feel free to leave the presence of the officers, terminate the encounter and go about his or her business. My review of the facts presented in this case leads to the conclusion that the situation in which defendant found himself was physically and socially intimidating to a minor with no prior experience with the legal system. "[W]hen, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity." *Haley v. Ohio*, 332 U.S. 596, 599, 92 L. Ed. 224, 228, 68 S. Ct. 302, 304 (1948).

Finally, I observe that our laws presume in a number of instances that minors lack the necessary judgment and maturity to participate in certain activities. For example, the law provides that a minor cannot enter into a contract that can legally be enforced against him (*e.g.*, *Severs v. Country Mutual Insurance Co.*, 89 Ill.

2d 515, 520, 434 N.E.2d 290, 61 Ill. Dec. 137 (1982)); restricts a minor's ability to drive (625 ILCS 5/6—103 (West 2006)); does not allow a minor to vote (10 ILCS 5/4—2 (West 2006)); and prohibits a minor's consumption of alcoholic beverages (235 ILCS 5/6—16(a)(i) (West 2006)). This raises the question as to why society is skeptical of a minor's judgment in certain contexts, and yet is readily willing to believe that a minor with no prior experience with the legal system is capable of making mature, rational and knowing decisions in the course of criminal proceedings, such as deciding to "voluntarily" accompany officers to the police station for questioning in a murder investigation.

For the foregoing reasons, I specially concur in the majority opinion.

JUSTICE BURKE joins in this special concurrence.

APPENDIX B — OPINION OF THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, THIRD DIVISION DECIDED SEPTEMBER 20, 2006

APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT, THIRD DIVISION

No. 1-04-2172

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

MARIANO LOPEZ,

Defendant-Appellant.

September 20, 2006, Decided

JUDGES: JUSTICE KARNEZIS delivered the opinion of the court. THEIS, P.J., and GREIMAN, J., concur.

OPINION BY: KARNEZIS

OPINION

JUSTICE KARNEZIS delivered the opinion of the court:

Following a bench trial, defendant Mariano Lopez was found guilty of first degree murder, armed robbery, home invasion, attempted aggravated arson and

aggravated unlawful restraint and was sentenced to concurrent prison terms of 23 years, 20 years, 20 years, 5 years and 3 years, respectively.[1] On appeal, defendant contends: (1) the trial court erred when it denied his motion to quash arrest and suppress evidence; and (2) defendant's written statement should have been suppressed pursuant to *Missouri v. Seibert*, 542 U.S. 600, 159 L. Ed. 2d 643, 124 S. Ct. 2601 (2004). We affirm.

Defendant was convicted of killing Hector Andrade. Andrade was discovered on the morning of July 14, 1998, in his apartment with his arms, legs and mouth bound with duct tape. He had been stabbed 12 times. Defendant, William Andrade[2] and Jose Leal[3] were arrested and charged with the murder. Defendant, who was 15 years old at the time of the murder, implicated himself in the murder during questioning by police officers. Defendant's first statement, given at approximately 6 p.m. on July 21, 1998, was suppressed

1. The Honorable Michael B. Bolan presided over defendant's pretrial motions before retiring. The Honorable Clayton J. Crane presided over defendant's trial.

2. William Andrade and the victim are not related. William Andrade's conviction was affirmed in part and vacated in part on appeal. *People v. Andrade*, 2003 Ill. App. LEXIS 1597, No. 1-01-1719 (2003)(unpublished order under *Supreme Court Rule 23*).

3. Jose Leal's conviction was affirmed on appeal. People v. Leal, No. 1-03-2226 (2005)(unpublished order under *Supreme Court Rule 23*).

by the trial court. Defendant's second statement, which was memorialized in writing at approximately 10 p.m. that evening, was not suppressed and is the subject of this appeal.

Initially, we note that defendant's contentions on appeal relate solely to the trial court's rulings on defendant's pretrial motions to quash arrest and suppress evidence. Yet, defendant failed to include the actual motions that were filed in the trial court in the record on appeal. *Illinois Supreme Court Rule 321* (155 Ill. 2d R. 321) provides, in pertinent part:

> "The record on appeal shall consist of the judgment appealed from, the notice of appeal, and the entire original common law record * * *. The common law record includes every document filed and judgment and order entered in the cause * * *." 155 Ill. 2d *R. 321.*

Nevertheless, we will review defendant's claims of error as supported by the transcripts from the hearing that defendant did include in the record on appeal. We note that it is appellant's burden to present a sufficiently complete record to support his claims of error. *Foutch v. O'Bryant,* 99 Ill. 2d 389, 391, 459 N.E.2d 958, 76 Ill. Dec. 823 (1984). Any doubts that may arise from the incompleteness of the record will be resolved against the appellant. *Foutch,* 99 Ill. 2d at 392.

Defendant first contends that the trial court erred in denying his motion to quash arrest and suppress

evidence. Defendant maintains that he was under arrest when police officers took him from his home and, because the officers lacked probable cause to arrest him at that point in time, his arrest was illegal. Defendant therefore maintains that because his arrest was illegal, his written statement should be suppressed "as the fruit of his illegal arrest."

At the hearing on defendant's motion to quash arrest, defendant testified that three police officers came to his home at about 1:15 p.m. on July 21, 1998. Two of the officers were inside and one was waiting in the hallway. The officers told defendant that he was going to go with them to the police station so they could ask him some questions. The officers told defendant to put his shoes on and one of the officers "pushed or grabbed" defendant and told defendant he was to go with them. The officers did not tell defendant's mother that she could accompany defendant. Defendant testified that he went with the officers because he thought he had no other choice. The two officers inside had guns but did not have them drawn. The third officer, in the hallway, had his gun out of its holster but then put it back. All of the officers were dressed in plain clothes. Defendant was placed in the backseat of the officers' police car and transported to the station. Upon arriving at the police station, defendant was brought into a room and questioned. He was in the room for about three to four hours. The officers would interrogate defendant and then leave the room for approximately two minutes and then return to question him again. The door to the room remained closed, and when officers left the room,

they locked the door from the outside. None of the officers told defendant he could leave and he did not feel he was free to leave. Neither of defendant's parents was at the station nor was a youth officer present. Defendant admitted that he never told the officers that he wanted to go home and that he never asked for his parents. The officers did not tell defendant that they wanted to talk to him about a homicide investigation; they told him they wanted to talk about gangs. Defendant stated that he was allowed to go to the bathroom whenever he needed to and he was offered food but was not hungry. Defendant was not handcuffed at any time and was fingerprinted only after his written statement was completed, at approximately 10 p.m. that night.

Defendant's mother, Maria Luisa Garcia, testified that when the officers came to her door, one of them asked for defendant and told her, "I'm going to take him." The officer later pushed defendant and told defendant, "let's go."

Lydia Villanueva, a friend of defendant's family, testified that she made several telephone calls to the police station to find out about defendant. She called the telephone number that was on the card that the officers had given to defendant's mother. She first spoke with Detective Bautista at about 3 p.m. that day. Detective Bautista told her that they were going to ask defendant some questions and then bring him home. She made several subsequent telephone calls, the last one at about 8 p.m.

Appendix B

Defendant's home phone records were introduced into evidence and showed that on July 21, 1998, between the hours of 2:30 p.m. and shortly after 7 p.m., there were five telephone calls placed from defendant's home to the number on the card that officers had given to defendant's mother.

Detective Alfonso Bautista testified that on July 21, 1998, he learned that defendant was a possible witness in the murder investigation. He and his partner, Detective Dennis Keane, went to defendant's home at about 12 p.m. that day. He denied the presence of a third officer. Detective Bautista spoke to defendant's mother in Spanish and told her that they wanted to talk to defendant. He told her that they were conducting a homicide investigation and defendant's name had been mentioned by some people they had spoken with and they wanted to talk to defendant. Detective Bautista then introduced himself and his partner to defendant and told defendant that they were investigating a homicide. He told defendant that his name had been mentioned by some people they had spoken with and they wanted to ask defendant some questions. He further told defendant that he would prefer to ask defendant questions at the police station if defendant would agree. Defendant agreed to accompany them to the police station. Detective Bautista told defendant's mother where the police station was located, but she declined to go with them. Detective Bautista denied touching or pushing defendant as they left the apartment. They drove defendant to the police station in an unmarked car and defendant was not handcuffed.

Appendix B

Detective Bautista testified that, upon arriving at the police station, defendant was placed in an interview room. He stated that defendant was a possible witness, not a suspect at that time. He and Detective Keane had a conversation with defendant at about 1 p.m., but did not give defendant his Miranda rights. The conversation lasted about 15 to 20 minutes. The detectives informed defendant that they needed to verify the information he had provided and advised defendant that if he needed anything while they were gone, he should knock on the door and another detective would come to the door. The detectives left the room and closed the door but did not lock it. They were gone for about 11/2 to 2 hours. When they returned, the door to the interview room was closed and unlocked. The detectives were also interviewing Jose Leal, who was at the station in a different interview room. At about 5:30 p.m., Leal implicated defendant in the murder. Shortly before 6 p.m., the detectives confronted defendant with Leal's statement and defendant made an inculpatory statement. Detective Bautista stated that they terminated the interview, gave defendant his Miranda rights and placed him under arrest. He stated that after Leal implicated defendant, defendant would not have been free to leave the police station.

Detective Bautista stated that they did not arrange for a youth officer when defendant arrived at the police station because he was a witness at that time and it was not common practice to have a youth officer present to interview a juvenile witness. He further stated that defendant never asked to leave the police station.

Sergeant Dennis Keane[4] also testified at the hearing. His testimony was consistent with Detective Bautista's testimony.

The trial court denied defendant's motion to quash arrest finding that defendant voluntarily accompanied the detectives to the police station. The court noted that defendant was 15 years old at the time of his arrest and did not have any prior contacts with the police. The court also noted that defendant's mother was given a card with Detective Bautista's telephone number and was told where the police station was located. Defendant was not handcuffed at any time and defendant's mother was told she could accompany defendant to the police station. The court acknowledged the discrepancy in testimony regarding whether the detectives grabbed or pushed or touched defendant as they were leaving the apartment, but stated there was no way to substantiate that it occurred. The court concluded that considering all of the circumstances involved, defendant was not under arrest when he was brought to the police station.

On appeal, defendant contends that the trial court's finding that he was not under arrest until approximately 6 p.m. on July 21, 1998, was manifestly erroneous. He argues that he was under arrest when the officers took him from his home.

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4. Sergeant Keane testified that, at the time of defendant's arrest, he had not yet been promoted to sergeant and was a detective.

Appendix B

The standard of review applicable to a ruling on a motion to quash an arrest and suppress evidence is twofold. The trial court's factual findings and credibility determinations are upheld unless they are against the manifest weight of the evidence. *People v. Jones*, 215 Ill. 2d 261, 267-68, 830 N.E.2d 541, 294 Ill. Dec. 129 (2005). A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *People v. Luedemann*, 357 Ill. App. 3d 411, 417, 828 N.E.2d 355, 293 Ill. Dec. 385 (2005), *appeal allowed*, 216 Ill. 2d 713, 839 N.E.2d 1032, 298 Ill. Dec. 385 (2005). After the trial court's factual findings are reviewed, the court's ultimate legal rulings are reviewed *de novo*. *Jones*, 215 Ill. 2d at 268.

To quash an arrest as violative of the *fourth amendment*, the burden is on the defendant to show that an illegal seizure has occurred. *People v. Graham*, 214 Ill. App. 3d 798, 806, 573 N.E.2d 1346, 158 Ill. Dec. 161 (1991). The defendant must first establish that a seizure occurred and, second, that the seizure was illegal. *Graham*, 214 Ill. App. 3d at 806. Pursuant to the *fourth amendment*, a seizure occurs when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509, 100 S. Ct. 1870, 1877 (1980). Factors to consider include: (1) the time and place of confrontation; (2) the number of officers; (3) the presence or absence of family or friends; (4) the presence of conduct normally involved in a formal arrest procedure, such as physical restraint, the show of

weapons or force, booking or fingerprinting; and (5) the manner by which the individual is transported to the police station. *Graham*, 214 Ill. App. 3d at 807.

Here, we find that the evidence presented at the hearing on the motion to quash arrest supports the trial court's finding that defendant voluntarily accompanied the detectives to the police station. Detectives Bautista and Keane confronted defendant in his home and told him that they were investigating a homicide and wanted to ask him some questions at the police station, to which defendant agreed. The detectives testified that they were the only two officers at defendant's home, and they specifically denied the presence of a third officer. Defendant's mother and sister were at home with defendant when the detectives arrived. Detective Bautista conversed with defendant's mother in Spanish, telling her where the police station was located and giving her a card with his telephone number. Defendant was neither physically restrained by the detectives nor was he handcuffed. The testimony at the hearing indicated that defendant walked out of his home with the detectives. Defendant was transported to the police station in an unmarked car and was not fingerprinted or read his Miranda rights. Defendant was brought to an interview room where the door was closed but not locked. Although some of defendant's testimony conflicted with the detectives' testimony, the trial court believed the detectives' testimony rather than that of defendant. We find no evidence to the contrary. The trial court's findings are supported by the record and are not against the manifest weight of the evidence.

Appendix B

The trial court did not err in denying defendant's motion to quash his arrest and suppress evidence.

Defendant relies on *People v. Vega*, 203 Ill. App. 3d 33, 560 N.E.2d 983, 148 Ill. Dec. 386 (1990). In Vega, this court found that the defendant had been seized without probable cause. This court noted that: the defendant was not questioned briefly in his home where he was found, despite his mother's inquiry as to why he could not be questioned at home; the defendant was searched before being placed into the back of a locked squad car and transported to the police station; the defendant was placed in an interrogation room at the police station and was only let out to speak with his mother on the telephone because officers had encouraged her to convince the defendant to take a polygraph test; and police officers transported the defendant in a police car to a crime laboratory for a polygraph examination without his consent. *Vega*, 203 Ill. App. 3d at 42-43. This court found that, considering all of the above circumstances, a reasonable person in the defendant's situation would not have considered himself free to go. *Vega*, 203 Ill. App. 3d at 43.

Here, unlike in *Vega*, the detectives told defendant that they wanted to bring him to the police station to ask him questions about a homicide. Neither defendant's mother nor his sister asked the detectives whether defendant could be questioned at home. Also, defendant was not searched prior to being transported to the police station. Further, there was no testimony that officers attempted to pressure or coerce defendant to submit

to a polygraph examination as in Vega. We are not persuaded by defendant's reliance on Vega. Accordingly, we find the trial court's denial of defendant's motion to quash his arrest and suppress evidence was proper.

Next, defendant contends that his written statement should be suppressed because it violates the "question first-warn later" interrogation technique found unconstitutional in *Missouri v. Seibert*, 542 U.S. 600, 159 L. Ed. 2d 643, 124 S. Ct. 2601 (2004). In Seibert, a plurality of the United States Supreme Court held that Miranda warnings given mid-interrogation, after the defendant had given a confession, were ineffective, and the confession, which the defendant repeated after Miranda warnings were given, was inadmissible at trial. In Seibert, the interrogating officer admitted that he intentionally employed an interrogation technique he had been taught in which he questioned the defendant without providing Miranda warnings first and obtained a confession and then provided Miranda warnings and repeated the questions to obtain the same answers "legally." The Supreme Court found that the threshold inquiry to determine whether a confession was voluntary was whether it would be reasonable to find that, under these circumstances, the warnings could function effectively as Miranda required. *Seibert*, 542 U.S. at 611-12, 159 L. Ed. 2d at 655, 124 S. Ct. at 2610. The plurality determined that it was likely that postconfession Miranda warnings would be ineffective in preparing a suspect for successive interrogation close in time and similar in content because a suspect who had just admitted guilt would hardly think he had a genuine right

to remain silent. *Seibert*, 542 U.S. at 613, 159 L. Ed. 2d at 655-56, 124 S. Ct. at 2610-11.

Prior to Seibert, the Supreme Court's analysis in *Oregon v. Elstad*, 470 U.S. 298, 84 L.Ed. 2d 222, 105 S. Ct. 1285 (1985), governed interrogations in which the defendant had first made inculpatory statements without the benefit of Miranda warnings, and then repeated those statements after Miranda warnings were given. In Elstad, the police went to the defendant's home to arrest him on a charge of burglary. As one of the officers spoke with the defendant's mother to explain why the defendant was being taken into custody, another officer detained the defendant in another room, informing him that the officers believed he was involved in a burglary. The defendant then acknowledged that he had been at the scene. After being taken to the police station, the defendant received full Miranda warnings, waived his rights and gave a confession. The Supreme Court held that the failure to give the defendant his Miranda warnings before his initial inculpatory statement did not require suppression of his subsequent warned confession. The Supreme Court stated:

> "It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective

> for some indeterminate period. Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Elstad*, 470 U.S. at 309, 84 L.Ed. 2d at 232, 105 S. Ct. at 1293.

We find the Seventh Circuit's guidance in its recent opinion in *United States v. Stewart*, 388 F.3d 1079 (7th Cir. 2004), helpful. The opinion analyzes the interplay between Seibert and Elstad. In Stewart, the Seventh Circuit determined:

> "At least as to *deliberate* two-step interrogations in which Miranda warnings are intentionally withheld until after the suspect confesses, the central voluntariness inquiry of Elstad has been replaced by a presumptive rule of exclusion, subject to a multifactor test for change in time, place, and circumstances from the first statement to the second. * * * Where the initial violation of Miranda was not part of a deliberate strategy to undermine the warnings, Elstad appears to have survived Seibert." *Stewart*, 388 F.3d at 1090.

Here, we examine whether there was any evidence that the detectives intentionally employed the two-step interrogation technique of question first, warn later when defendant was interviewed at the police station.

We find no evidence in the record to support such a finding. Detective Bautista testified that defendant was a witness and not a suspect when he was brought to the police station. He stated that it was only later in the afternoon, sometime after Jose Leal implicated defendant in the murder, that defendant would not have been free to leave. There is no indication that the detectives intentionally withheld Miranda warnings in order to first secure a confession, only to have defendant repeat it after being given Miranda warnings.

Defendant specifically argues that his written confession violates the holding in *Seibert* and should be suppressed because "the interrogation from the incriminating oral statement to the incriminating oral and written statements [is] one continued interrogation." As stated above, courts should depart from the *Elstad* analysis of voluntariness only where the police set out deliberately to withhold Miranda warnings until after a confession has been secured. There is no evidence that this occurred. We reject defendant's contention that his written statement should be suppressed because it violates the "question first-warn later" interrogation technique found unconstitutional in Seibert.

Accordingly, we affirm the judgment of the circuit court.

Affirmed.

THEIS, P.J., and GREIMAN, J., concur.

APPENDIX C — REPORT OF PROCEEDINGS OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT, CRIMINAL DIVISION DATED MAY 8, 2001

STATE OF ILLINOIS

COUNTY OF COOK

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CRIMINAL DIVISION

98 CR 20989

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

MARIANO LOPEZ

REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 8th day of May, 2001, this cause came on for hearing before the Honorable MICHAEL BOLAN, Judge of said Court [excerpt from record on appeal, Vol. 4 of 6 at pp. 61-65]

THE COURT: The Court finds the following facts based on the evidence: Mariano Lopez at the time of the statement was 15 years of age. He was initially encountered at the home and he came to the police station for questioning. He was transported there voluntarily.

Appendix C

The police are investigating a murder case, okay, so they are questioning people to find out — if they can find out information. I'm somewhat amused by the term "suspected witnesses." They wouldn't be asking him if they knew something, which a policeman has the right to do, otherwise they would be drawing unemployment compensation. They are supposed to be asking questions.

The question here is whether or not there is some transgression of the Defendant's rights guaranteed under the constitution. If there is, then there should be an exclusion from evidence at the trial of the case of an involuntary statement.

Now, aside from being a juvenile, there are certain other caveats to be observed in some of the things you are to consider, the age, education, experience of a particular Defendant, and there is no bright line test to tell you, if you cross this line, you have a violation of the constitution, it is not so simple. You must consider all the facts and circumstances under which the statement was made.

In the first place, they communicated with the Defendant's parents, went to his home, brought him to the police station, want to talk to him.

He is young, he has not had an experience of being in a police station, being a person who is questioned in a police station. Counsel for defense would suggest, any time they question a person in a police station, you get them away from distracting influences the person is

accustomed, that's not true. There's no mandate, to be questioned, a person has to have a comfortable surrounding, they can play a stereo or VCR, it puts him in a business-like atmosphere, you transgress constitutional rights.

What concerns me is, at 5:00 p.m. in the afternoon, they talk to Co-Defendant Leal, and from Leal in the presence of Leal's father, they learn that he makes a statement inculpating himself and inculpating Mariano Lopez. Okay, at this juncture, the police have probable cause to arrest Mariano Lopez, right, and he's in the police station.

Now, whether they decide to arrest him or not, I just want to clear a few of these things up before I do anything further, so before you do anything further, you advise a person of their rights. This is custodial interrogation, this person is not free to come and go, it is focused on this person as a potential perpetrator of this crime. And him being a juvenile, you should contact a parent or youth officer.

A youth officer is to be not in loco parentis but to protect the needs of a minor. It is vague what his duties are to me, but for instance, in and of itself, if you don't call a youth officer doesn't mean the statement should be suppressed, it means one of the factors to be considered and we can determine ultimately whether or not this statement was freely and voluntarily made. It was after Leal made the inculpatory statement inculpating himself and Mariano, the conversation they had with Mariano Lopez, and Mariano admits to participating in some capacity as co-offender. He gave enough rope to hang himself showing

he is accountable for the offense. That statement where he was advised of his rights, it is free voluntary waiver, that oral statement should be -- that's, the one at 5:45. It may be a horse of a different color on the 10 p.m. statement.

Here, you have the parent's denial, that father was not present. I did not see any hocus pocus by the police, the deception on the father. Are you to help your son out here? I don't believe a scintilla of what he said. He was there, he signed the statement, Mariano signed the statement knowingly, done knowingly, intelligently and with a parent present.

That statement would not be suppressed as being involuntary. The question is whether or not there's continuation and whether there is a sufficient pause, gap, between the statements to suppress the oral statement that signifies the 5:45 p.m. and the 10:00 statement. The Judge herein should be held on that.

The Vega case is a continuation case not a voluntariness case. Getty was the trial Judge in that and McNamara was the opinion Judge in the case. His terms, even though they held away [sic] as to the issues in this case in determining whether or not the statement was made, the Court found it was free and voluntarily, made after a knowing waiver of the Rights of Miranda, and although there is this statement initially inculpating himself at 5:45, the statement should be suppressed.

I don't see any reason to suppress the one at 10:00 p.m., that's the way it is. Motion granted in part, motion denied in part.

APPENDIX D — REPORT OF PROCEEDINGS OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT, CRIMINAL DIVISION DATED JULY 16, 1999

STATE OF ILLINOIS

COUNTY OF COOK

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CRIMINAL DIVISION

98 CR 20989

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

MARIANO LOPEZ

REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 16th day of July, 1999, this cause came on for hearing before the Honorable MICHAEL BOLAN, Judge of said Court [excerpt from record on appeal, Vol. 2 of 6 at pp. 87-93]

THE COURT: You are talking Fifth Amendment stuff here. Age, education, and experience determinative whether a person gives a statement freely and voluntarily or whether it is a mind overborne by the circumstances or the surroundings. Those types of factors are more probative to that issue than this issue.

Appendix D

This issue is whether or not defendant was arrested at the time he gave his statements and not warned about Miranda. The question is argued by the Defense here that the arrest occurred when the defendant first arrived at the police station at about 1:00 in the afternoon.

Now, it is the posture of the State that the defendant was not arrested until several hours later, at about shortly before 6:00 p.m., after defendant gave an inculpatory statement.

The question of arrest is not totally a subjective thing. It is a perception of the arrestee. Otherwise the person would say, well, a policeman looked at me with mean eyes and I felt I was under arrest. That's ridiculous. A reasonable man aspect, if a person — reasonable person in the circumstances given consideration of age, education, experience.

In this case we have a 15-year-old person taken from his home. Police officers come to his home. They do not force him. There is much made about somebody saying the policemen grabbed him by the collar, and the policemen deny that. So you have got a question. There is no way to substantiate that. The policemen denied that.

In any event, he was not cuffed. He was transported to a police station. His parents — his mother was told in her first language — she is a Spanish-speaking individual — that they wanted to question the defendant. She said a ruse took place, that the defendant

wanted to talk about gangs in the neighborhood. It would be a ruse if you said that when you were taking him down as a witness/possible suspect in a murder case. The policemen deny they said.

These are the persons that we know he was talking about because these are the persons who were speaking the same language as Mariano Lopez .

He knocks. He would like to speak to him. Talks to his mother. Brings him out of his room. Prefer to talk to him at Area 4. The police officer or Bautista says that the defendant agreed to go with the police. He told the mother they were taking the defendant to Harrison and Kedzie. Gave her a card. The card did not have an address. It has a name and telephone number.

We can go to this further conversation whether or not the daughter is defendant's sister. Asks if it is necessary for a parent to go, and Detective Keane says not necessary, you could. And then Officer Bautista tells the same thing to mother in Spanish. Okay, that's what the policemen said.

Now, they go to the police station in the police car up to the Area 4, and defendant is ushered into an interview room which has a door that has a latch on the outside, latchable door, but they said it was not latched, okay. Then there is a conversation with him at that time, approximately 1:00 o'clock in the afternoon.

Appendix D

I don't see the circumstances, although the cases cited by Counsel, that's not mutually exclusive things that the policemen do; otherwise the question of arrest is for — is a question of law. And there are a number of circumstances that you can determine whether or not a person is indeed in custody, okay.

And contrary to the police officers, the mother of the defendant says she was not told by the police that she could come to the station. She says that the police officer put his hands on the defendant's shoulders. That's what the defendant said — pardon me, not the mother. The defendant says he was not cuffed. He says the door was locked. The defendant additionally has had no prior contacts with the police, okay.

At the police station, there is no youth officer present. Now, presence of the youth officer — what is the function? The function of a youth officer is to look out for the interests of a youth, okay. It doesn't necessarily mean that you are saying I want a youth officer there for a statement or I need the youth officer to use to contact a parent. The parents have been contacted already, so the need for youth officer interaction is not necessary at this juncture.

The mother's testimony, she says that the police officer pushed defendant but didn't hurt him, so obviously whatever contact he did have, I am not satisfied — I don't think that the defendant was under arrest at the time considering all of the circumstances involved here.

They are quite candid with the defendant. They say they want to question him. They want to take him and do the questioning at the police station, and they are investigating this case and — investigating a homicide. I want to talk to you. They bring him down to the police station. I don't find that the defendant is under arrest.

The testimony of the policemen at worst is that he is a witness, maybe a suspect, but he is certainly not under arrest at this time at 1:00 o'clock in the afternoon.

There is a name and telephone conversation between the defendant's family and the police officer, the police — somebody police officers according to the phone log records and at a time after 1:00 p.m. It is like 2:00 —

MR. REARDON: 2:30.

THE COURT: (Continuing) — 2:21 p.m.

Then shortly — whatever conversation took place — two short conversations after that one minute. That means if you call radio log/telephone logs say, one minute, one minute — if you talk three seconds, you get charged one minute so — and then those occur — the latest one at 5:11 p.m. The next conversation after that is at 6:26, 7:01. Those are of a longer duration. Those are four minutes.

So obviously they did reach the police department detectives at 2:21 p.m. This is subsequent to the conversation at 1:00 p.m. with him, which was exculpatory. And it also indicates to me that these very brief conversations — they are not denied access to the defendant.

There is nothing — I am trying by memory, adducement, trying to think back if there is anything that I should adduce from the circumstances that I didn't see before that would say clearly that the defendant was indeed arrested. I don't find it.

Therefore, the Court finds that the arrest did not occur prior to the statement given at or about 6:00 p.m. — was it 7-21?

MS. STEPHENSON: Yes.

THE COURT: (Continuing) — on 7-21, on July 21st, 1998. So therefore that aspect of the motion — I will deny your motion on that basis.

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No. 08-362

Supreme Court, U.S.
FILED
DEC 10 2003
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In The

Supreme Court of the United States

STATE OF ILLINOIS,

Petitioner,

v.

MARIANO LOPEZ,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner has presented three reasons for this Court to grant its Petition for a Writ of Certiorari. Respondent submits that petitioner has waived all of these reasons before this Court because none of these reasons were presented to any reviewing court below.

Respondent further submits to the Court, that even assuming, *arguendo,* that petitioner has not waived the reasons for the Court to grant its Petition for a Writ of Certiorari, its arguments do not provide this Court with compelling reasons for accepting the Petition for a Writ of Certiorari.

Supreme Court Rule 10 lays forth considerations governing review on writ of certiorari. Subsection (a) clearly does not apply to this case. Subsection (b) states that a consideration is whether "a state court of last resort has decided an important federal question in a way that conflicts with a decision of another state court of last resort or of a United States court of appeals." As will be demonstrated, *infra*, this consideration does not apply to this case. Finally, subsection (c) states a consideration is whether "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Again, as will be demonstrated, *infra*, this consideration does not apply to this case.

Finally, Supreme Court Rule 10 states "[a] petition for writ of certiorari is rarely granted when the

asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." As will be demonstrated, *infra*, the best claim that petitioner can make, *arguendo*, is that the Illinois Supreme Court misapplied a properly stated rule of law. As such, this Petition for a Writ of Certiorari should not be granted. The unanimous decision of the Illinois Supreme Court does not merit review by this Court.

COUNTER-STATEMENT OF THE CASE

The *Statement of the Case* in the Petition for a Writ of Certiorari has a factual omission. It does not mention that Detective Keane testified that respondent would not been permitted to leave the police station after Leal's written confession was obtained and before respondent gave an oral confession without the benefit of having received *Miranda* warnings before he made the oral confession. (Pet. App. A, p. 50a)

REASONS FOR DENYING THE WRIT

I. PETITIONER HAS WAIVED EACH REASON IT CITES FOR THE GRANTING OF ITS PETITION FOR A WRIT OF CERTIORARI.

A. Petitioner has Waived the Issue of Whether this Court has Resolved the Issue of Whether the Objective "Reasonable Person" Test May Include Consideration of the Suspect's Particular Characteristics.

Petitioner argues that this case presents the Court with the opportunity to resolve the issue of "whether the 'reasonable person' test may include considerations of the suspect's personal characteristics, outside the shadow of the standard of review dictated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)." (Pet. p. 15)

Petitioner makes this argument by relying on the *dicta* contained in the Court's decision in *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004). (Pet. p. 15) This *dicta* will be discussed in *Reason II*, *infra*.

Petitioner never mentioned this argument in any filings in the reviewing courts below. *Yarborough* is never mentioned in any of petitioner's Briefs and Arguments below. A discussion of *Yarborough* is never mentioned in the Opinions attached to the Petition for a Writ of Certiorari. (Pet. App. A and B) The reason that *Yarborough* is never discussed in the Opinions below is that petitioner never once

mentioned *Yarborough* or the argument it now makes based upon *Yarborough* to the courts below. (Pet. App. A and B)

It should be emphasized that *Yarborough* was decided in 2004. The Briefs and Arguments that petitioner filed in the Illinois Appellate Court and Illinois Supreme Court were filed well after *Yarborough* had been decided. There is simply no reason that petitioner could not have raised this issue in the reviewing courts below. There is certainly no reason that petitioner could not have raised the *Yarborough* issue in a Petition for Rehearing before the Illinois Supreme Court, a Petition for Rehearing that was never filed.

As such, because petitioner failed to raise its first reason for granting this Petition for a Writ of Certiorari (the *Yarborough* issue) in any reviewing court below it should be barred from raising this issue for the first time in this Court. *See, Steagald v. United States*, 451 U.S. 204, 208-211 (1981). *See also, Giordenello v. United States,* 357 U.S. 480, 488 (1958). As stated in *Steagald* at page 209:

> The Government, however, may lose its right to raise factual issues of this sort before this Court when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation.

B. Petitioner has Waived the Issue of Whether the Illinois Supreme Court's Consideration of the Respondent's Age and Experience when Determining Whether he was Seized or in Custody Directly Conflicts with the Decisions of this Court.

Respondent references his discussion in *Reason I.A.* above. Not only did petitioner fail to mention *Yarborough* in any Brief and Argument that it filed in the reviewing courts below, petitioner also failed to make the wider argument that the Illinois Supreme Court's consideration of the respondent's age and experience when deciding when the respondent was seized or in custody directly conflicted with decisions of this Court. This argument could have been made in the petitioner's Brief and Argument before the Illinois Supreme Court. In its Briefs and Arguments below, petitioner distinguished the juvenile cases that respondent cited. This can be ascertained by examining the Opinions contained in the Appendices to petitioner's Petition for a Writ of Certiorari. (Pet. App. A and B) Petitioner never argued that these cases involving juveniles were irrelevant because there should be no consideration of a defendant's age or experience when deciding when a person should be considered seized or in custody; petitioner never argued that the cases involving juveniles cited by respondent had been decided in contravention to the precedents of this Court.

As such, petitioner has waived this issue and this Court should not grant this Petition for a Writ of Certiorari based upon an issue that has been waived below. The substantive issue raised by this reason will be discussed in *Reason III*, *infra*.

C. Petitioner has Waived the Issue of Whether this Court Should Adopt a *De Novo* or a "Clear Error" Standard When Reviewing Whether the Police have Deliberately Engaged in a "Question First, Warn Later" Scheme in Order to Circumvent *Miranda v. Arizona*.

Respondent again references the arguments made in *Reasons I.A. and I.B.* above. Once again, petitioner has raised an issue that it completely ignored in the reviewing courts below. Petitioner never suggested to the Illinois Supreme Court, one way or the other, what the correct standard of review was when reviewing a *Missouri v. Seibert,* 542 U.S. 600 (2004) claim. Petitioner never filed a Petition for Rehearing before the Illinois Supreme Court after its decision was issued, challenging the alleged incorrect standard of review that the Illinois Supreme Court had used with regard to the *Seibert* issue.

As such, petitioner has waived this issue and this Court should not grant this Petition for a Writ of Certiorari based upon an issue that has been waived below. The substantive issue raised by this reason will be discussed *Reason IV*, *infra*.

II. THE INSTANT CASE DOES NOT PROVIDE THIS COURT WITH THE PROPER VEHICLE TO CONSIDER WHETHER *DICTA* IN *YARBOROUGH* IS THE PROPER STANDARD OF REVIEW WHEN DETERMINING WHETHER A JUVENILE IS IN CUSTODY FOR *MIRANDA* PURPOSES. (RESPONDING SUBSTANTIVELY TO PETITIONER'S REASON I)

Petitioner claims that the Illinois Supreme Court made a "faulty determination that a minor's custodial status, for Fourth Amendment Purposes, requires consideration of characteristics personal to the individual, including age, educational background, and experience with the criminal justice system." (Pet. p. 15) Petitioner cites to *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004) to claim that the Illinois Supreme Court's decision in this case conflicts with this Court's holding in *Yarborough*. There are several problems with petitioner's analysis.

As petitioner itself makes clear, *Yarborough's* language concerning whether age, educational background and experience with the criminal justice system are to be considered when determining whether a reasonable person is in custody for *Miranda* purposes, is clearly *dicta*. (Pet. p. 17) Further, even the *dicta* in *Yarborough* does not state that a court may not consider age; rather *Yarborough* states it was not unreasonable for the trial judge not to consider it.

The Illinois Supreme Court ruled that respondent (who was 15 years old at the time) was not under arrest when he first left his home with Chicago Police Detectives on July 21, 1998. Respondent argued below that he had been arrested when he left his home with Chicago Police Detectives on July 21, 1998. (Pet. App. A, p. 26a-36a) The Illinois Supreme Court distinguished the cases involving juveniles that respondent presented when making its ruling. (Pet. App. A, p. 29a-36a)

However, the Illinois Supreme Court then ruled that while he was at the police station, respondent's voluntary appearance did turn into an illegal arrest. This determination did not turn on respondent's status as a juvenile. The Illinois Supreme Court makes this clear when it cites to *People v. Barlow*, 273 Ill.App.3d 943 (1995). (Pet. App. A, p. 36a) *Barlow* dealt with the issue of a defendant's initial voluntary presence at a police station turning into a subsequent illegal arrest. *Barlow* was not a juvenile. (Pet. App. A, p. 36a-38a)

Further, the Illinois Supreme Court used the following factors to rule that respondent's initial voluntary appearance at the police station later turned into an unlawful detention:

> In this case, the facts demonstrate that defendant arrived at the police station at 1 p.m. and was immediately placed in an interview room for questioning. He was interviewed by two detectives for approximately 20 minutes and was advised during the

> interview that he had been implicated in a crime. Defendant then provided information about the crime and was told to wait in the interview room while the detectives conducted further investigation. Defendant was not taken out of the interview room and escorted to an open area. He was not permitted to walk around the police station without an escort. Instead, he was left in an interview room with the door shut and told to knock if he needed to use the restroom or required other assistance. The detectives testified that the room was unlocked, but defendant believed that he was locked in. Defendant was not advised that he was free to leave even though the detectives testified that defendant would have been permitted to leave at this point if he desired. Defendant remained in the interview room for four hours without contact with his family or any other person interested in his well-being. Defendant's family was calling repeatedly to obtain information about defendant's status, but were never advised that he was free to leave; only that he was being questioned. (Pet. App. A, p. 36a-37a)

These are some of the very same factors cited in both numerous cases and commentary. For instance, in *United States v. Griffin*, 922 F.2d 1343, 1352 fn. 12 (8th Cir. 1990) the court listed the following factors in determining whether a reasonable person would have believed that he was under arrest:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong-armed tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated, e.g., was questioning public or incommunicado, was suspect separated from those who would lend moral support, did authorities dictate the course of conduct of the suspect or other persons present, et cetera; or, (6) whether the suspect was placed under arrest at the termination of the questioning.

In the instant case, respondent was not advised at the time of the questioning that the questioning was voluntary. He was not advised that he was free to leave or request the officers to do so. He was not advised that he was not under arrest. He did not possess unrestrained freedom of movement during questioning. Respondent did not initiate contact with authorities. The atmosphere of the questioning was police dominated in that the questioning occurred incommunicado and not in public. The police dictated the course of conduct of the respondent. The

respondent was placed under arrest at the termination of the questioning.

Other factors looked at by the courts and commentators are whether the police deprived the suspect of means of departure and whether the suspect knew that the police had substantial evidence of his criminal involvement. 3 Wayne R. LaFave, *Search and Seizure*, § 5.1(a), p. 10-11 (4th ed. 2004) In the instant case, respondent was deprived of means of departure and the police told him that they had substantial evidence of his criminal involvement.

Analyzing the aforementioned factors, it is clear that the Illinois Supreme Court properly determined that the respondent's initial voluntary appearance at the police station later turned into an unlawful detention. Respondent's status as a 15-year-old juvenile had virtually nothing to do with this analysis. Regardless of the respondent's age, the decision of the Illinois Supreme Court regarding when respondent was in unlawful custody was correct. As such, this case is not a proper vehicle for this Court to determine the issue of whether or not the "reasonable person" test should incorporate a suspect's age, experience and contact with the criminal justice system as part of the inquiry.

III. THE ILLINOIS SUPREME COURT'S CONSIDERATION OF THE RESPONDENT'S AGE AND EXPERIENCE WHEN DETERMINING WHETHER HE WAS SEIZED OR IN CUSTODY DOES NOT DIRECTLY CONFLICT WITH THE DECISIONS OF THIS COURT. (RESPONDING SUBSTANTIVELY TO PETITIONER'S REASON II)

Respondent adopts the argument made above in *Reason II.* In particular, as argued above, respondent submits that the Illinois Supreme Court did not hinge its reasonableness inquiry on respondent's age and experience. (Pet. p. 25)

Further, as pointed out in *Yarborough* at p. 666, "[O]ur opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration." This is because none of the decisions cited by petitioner, except for *Yarborough,* involved minors. It should also be emphasized that the concurring Opinion by Justice O'Connor in *Yarborough* stated the following at p. 679:

> There may be cases in which a suspect's age will be relevant to the "custody" inquiry under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In this case, however, Alvarado was almost 18 years old at the time of his interview. It is difficult to expect police to recognize that a suspect is a juvenile when he is so close to the age of majority.

As such, petitioner's *Reason II* does not support the granting of its Petition for a Writ of Certiorari.

IV. THE CIRCUITS HAVE NOT SPLIT OVER WHETHER TO USE A *DE NOVO* OR A "CLEAR ERROR" STANDARD WHEN REVIEWING WHETHER THE POLICE HAVE DELIBERATELY ENGAGED IN A "QUESTION FIRST, WARN LATER" SCHEME IN ORDER TO CIRCUMVENT *MIRANDA V. ARIZONA*. (RESPONDING SUBSTANTIVELY TO PETITIONER'S REASON III)

Petitioner has set up a "straw man" by claiming that there is a significant split in the circuits regarding the proper standard of review for a *Seibert* claim. Petitioner cites to six cases at page 29 of its Petition for a Writ of Certiorari to stand for the proposition that the standard of review for a *Seibert* claim is "clear error." But this is not exactly what these cases state about the proper standard of review. As stated in *United States v. Mashburn,* 406 F.3d 303, 309 (4th Cir. 2005):

> In reviewing the denial of Mashburn's motion to suppress, we must accept the factual findings of the district court unless clearly erroneous, but we review de novo the conclusion of the district court that Mashburn's postwarning statements were voluntary. (citation omitted)

Thus, it is clear that there is both a "clearly erroneous" part of the standard of review and a *de*

novo part of the standard of review. This is the same standard that has been used by the courts for years when reviewing a *Miranda* voluntariness issue. *See, e.g., United States v. Braxton*, 112 F.3d 777, 781 (4th Cir. 1997) (en banc). There have been no new developments in regard to a special or different test for evaluating *Seibert* issues. There is no split in the circuits regarding the proper standard of review, much less a "significant" split in the circuits regarding this issue.

Petitioner cites two cases at page 29 of its Petition for a Writ of Certiorari (*United States v. Carter*, 489 F.3d 528 (2nd Cir. 2007) and *United States v. Street*, 472 F.3d 1298 (11th Cir. 2006)), and alleges that these cases "appear" to have applied a *de novo* standard when reviewing a *Seibert* claim. Petitioner does not explain how these cases "appear" to have applied a *de novo* standard. These cases do not stand for the proposition that petitioner claims they stand for.

In *United States v. Carter*, 489 F.3d 528, 534 (2nd Cir. 2007) the court stated that:

> "We review a district court's determination regarding the constitutionality of a *Miranda* waiver *de novo* and a district court's underlying factual findings for clear error."

This language is almost identical to the language used in *Mashburn*.

In *United States v. Street*, 472 F.3d 1298 (11th Cir. 2006) the word *de novo* is not even used in the

decision. It is incomprehensible how petitioner can allege that either of these cases "appears" to establish a *de novo* standard for the review of a *Seibert* claim. Petitioner has clearly failed to demonstrate any split in the circuits regarding the proper standard of review for a *Seibert* claim.

Further, the Illinois Supreme Court did not adopt a *de novo* standard when evaluating the *Seibert* claim in this case. The Illinois Supreme Court certainly did not announce in its decision that it was using a *de novo* standard of review when evaluating the *Seibert* claim. There is absolutely nothing contained in the Opinion of the Illinois Supreme Court which would indicate that the Illinois Supreme Court adopted a *de novo* standard in evaluating the *Seibert* claim. (Pet. App. A)

This is demonstrated by the fact that the Illinois Supreme Court references *United States v. Williams*, 435 F.3d 1148 (9th Cir. 2006) when performing its analysis of the *Seibert* issue. *Williams* is cited with approval in one of the cases (*United States v. Navarez-Gomez,* 489 F.3d 970, 974 (9th Cir. 2007)) that petitioner cites for the proposition that some circuits have adopted a "clearly erroneous" standard of review when evaluating an alleged *Seibert* violation. (Pet. App. A p. 29a) It is illogical to presume that the Illinois Supreme Court used a *de novo* standard of review when it cited to *Williams* in its Opinion.

The following passage from the Opinion of the Illinois Supreme Court demonstrates what is at issue in this case:

> The objective and subjective evidence available to this court, when viewed in its totality, supports an inference that the detectives engaged in some form of the "question first, warn later" interrogation technique when they confronted defendant at 6 p.m. with Leal's statement and obtained defendant's oral confession. The uncontested facts demonstrate that Leal was taken into custody after implicating defendant and confessing to his own part in the crime. If Leal's statement was sufficient to elevate his status from that of a witness to a suspect, we presume it had the same effect on defendant's status. We acknowledge that Detective Keane testified otherwise, stating that defendant was still considered a witness after Leal's incriminating statement. We also acknowledge that the trial court found Detective Keane's testimony to be credible overall, and defendant does not challenge the trial court's credibility assessment as being against the manifest weight of the evidence.
>
> However, the record demonstrates a contradiction in Detective Keane's testimony which the trial court did not specifically address and we cannot ignore. Although Detective Keane claimed that defendant was not a suspect, he nevertheless testified that defendant would not have been free to leave the police station at 6 p.m. after Leal's

incriminating statement had been obtained. In light of these facts, we can think of no legitimate reason why the detectives failed to give defendant his *Miranda* warnings prior to the 6 p.m. confrontation, other than a deliberate decision to circumvent *Miranda* in hopes of obtaining a confession, which would ultimately lead to a handwritten statement.

In his concurrence in *Seibert*, Justice Kennedy discussed situations where an officer might mistakenly withhold *Miranda* warnings, and pointed out that mistakes of this sort could not be considered deliberate. "An officer may not realize that a suspect is in custody and warnings are required. The officer may not plan to question the suspect or may be waiting for a more appropriate time." *Seibert*, 542 U.S. at 620, 124 S.Ct. at 2615, 159 L.Ed.2d at 660 (Kennedy, J., concurring). We do not believe that the detectives in this case made such a mistake. The detectives were clearly interrogating defendant, as they confronted him with Leal's statement and pointedly asked him if he was involved in the crime. Moreover, it was plain that defendant was in custody, as Detective Keane testified that defendant would not have been free to leave the police station at that time. We find that the objective and subjective evidence present in the record supports an inference that detectives deliberately withheld *Miranda* warnings from defendant. (Pet. App. A, p. 50a-51a)

This passage indicates that the Illinois Supreme Court found that Detective Keane's testimony claiming that he considered respondent to still be a witness after Leal's written confession and arrest, was unworthy of belief and not credible in the light of human experience, regardless of whether the trial judge found Detective Keane to be generally credible. Contrary to petitioner's assertions, the Illinois Supreme Court could and did find that Detective Keane's testimony that respondent was still a witness, even after Leal's written confession implicating respondent, was "so inconsistent or improbable on its face that no reasonable factfinder could accept it." (citation omitted) (Pet. p. 32) This was because of Detective Keane's own admission that respondent would not have been free to leave the police station following Leal's written confession. This admission proved that Detective Keane did not believe that respondent was still a witness following Leal's written confession. If Detective Keane truly believed that respondent was still a witness following Leal's written confession, there was simply no reason that respondent would not have been permitted to leave the police station at that time.

No court is bound by a police officer's self-serving pronouncement regarding intent in this context. As stated in footnote 6 of *Seibert*, "because the intent of the officer will rarely be as candidly admitted as it was here (even as it is likely to determine the conduct of the interrogation), the focus is on facts apart from intent that show the question-first tactic at work."

Seibert, at 617. This is exactly what the Illinois Supreme Court did when it analyzed the facts of this case.

Petitioner's final claim is that this case provides this Court with an opportunity to "clarify *Seibert* regarding what is needed to show that a delay in giving *Miranda* warnings is not deliberate." (Pet. p. 32) This is a disingenuous assertion, at best.

Petitioner claims that respondent was not given *Miranda* warnings because he was still considered a witness when he was first confronted following Leal's written confession. This issue has already been dealt with above. Petitioner then attempts to distinguish respondent's later written statement from his first unwarned statement claiming that the first statement was not "exhaustive." Respondent does not understand what petitioner means by "exhaustive." In respondent's oral statement, given without the benefit of *Miranda* warnings, "[r]espondent admitted that he, Leal and William Andrade entered the victim's apartment, that the victim was tied up and stabbed, and that they left with some proceeds." (Pet. p. 10) Certainly, this confession would have been "exhaustive" enough for the respondent to have been convicted, had this confession been admitted into evidence. All the respondent did, when giving the written statement, was to confess, in slightly more detail, that he, Leal and William Andrade entered the victim's apartment, tied up and stabbed the victim and left with some proceeds. The notion that there is

no *Seibert* violation here because of the difference in the two statements is ridiculous on its face.

When looking at all of the factors discussed, it is clear that the Illinois Supreme Court ruled correctly in suppressing respondent's written confession because of the *Seibert* violation.

The Illinois Supreme Court ruled as follows when confronted with this issue:

> The facts of this case demonstrate that sometime after 8 p.m., about two hours after defendant's oral confession, defendant's father arrived at the police station. He was permitted to speak to defendant alone. Shortly thereafter, the assistant State's Attorney met with defendant, advised him of his *Miranda* rights, and obtained defendant's handwritten statement in the presence of defendant's father, Detective Keane, and Detective Velez, who acted as an interpreter. This meeting took place in the same interview room in which defendant had spent the day. Defendant was not advised that his oral statement could not be used against him.
>
> We recognize that defendant's handwritten statement was taken after defendant received *Miranda* warnings at least twice, that an assistant State's Attorney was doing the questioning rather than a detective, and that defendant's father was present. However, the unwarned and warned statements were taken close in time, in the same place, with Detective Keane present for both, and

> defendant was never advised that his oral statement would be inadmissible. Viewing all the relevant factors, we cannot conclude that a reasonable juvenile in defendant's position would have understood that he had a genuine choice about whether to continue talking to the police. We find that defendant's handwritten statement was involuntary for fifth amendment purposes pursuant to the United States Supreme Court's decision in *Seibert*. Defendant's handwritten statement should have been suppressed. (Pet. App. A, p. 53a-54a)

Respondent cannot state the issue any more clearly.

CONCLUSION

For all of the reasons discussed herein, petitioner has failed to show that the Illinois Supreme Court's unanimous Opinion is worthy of review by this Court. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
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No. 08-362

IN THE

Supreme Court of the United States

THE STATE OF ILLINOIS,

Petitioner,

v.

MARIANO LOPEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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ARGUMENT

I. Petitioner Has Not Waived Any Of The Reasons For Granting The Petition Because The Illinois Supreme Court Raised Those Issues *Sua Sponte* In Its Decision.

Respondent's contention that petitioner's arguments have been waived is without merit because the Illinois Supreme Court raised these issues *sua sponte*. "It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991). This Court applied this principle in *Cohen* to a Minnesota Supreme Court decision that was based on an estoppel theory first raised by one of the justices during oral argument. *Id.* at 666-67. Although the estoppel issue had not been briefed or argued at any point in the state courts, including in a petition for rehearing, the Court nevertheless held that it was appropriate for review because it had been considered and decided by the state supreme court. *Id.* As in *Cohen*, here the Illinois Supreme Court expressly addressed the issues upon which certiorari is sought. In addition, it would be inequitable to, as respondent urges, limit petitioner to arguments forwarded in the state courts because petitioner had no cause to argue these issues until the court raised them *sua sponte*.

In particular, neither the trial court nor the appellate court considered respondent's age when determining whether he was seized for Fourth Amendment purposes. (Compare Pet. App. B, C, and

D). Thus, the issue did not arise until the Illinois Supreme Court declared: "When assessing whether a juvenile was seized for purposes of the fourth amendment, we modify the reasonable person standard to consider whether a reasonable juvenile would have thought that his freedom of movement was restricted." (Pet. App. 28a). Similarly, the standard for reviewing whether the police deliberately engaged in a "question first, warn later" scheme was never in dispute until the court issued its opinion assessing the witnesses' credibility on this issue *de novo*.

Respondent's reliance on *Steagald v. United States*, 451 U.S. 204 (1981), to support his claim that petitioner is "barred" from raising certain arguments in this Court (Resp. Br. at 4), is sorely misplaced. In *Steagald*, the government never challenged the magistrate's finding that the building searched was Steagald's home. *Id.* at 209-210. To the contrary, the government acquiesced in the finding by arguing that Steagald's "connection with the searched home was sufficient to establish his constructive possession of the cocaine found in a suitcase in the closet of the house." *Id.* Moreover, although the government could have filed a cross-petition for certiorari seeking a remand to determine whether the building was Steagald's residence, it instead argued that further review was unnecessary, conceding that the searched home was Steagald's residence. *Id.* at 210. Accordingly, this Court held "that the Government, through its assertions, concessions, and acquiescence, has lost its right to challenge petitioner's assertion that he possessed a legitimate expectation of privacy in the searched home." *Id.* at 211.

Unlike *Steagald*, here petitioner never asserted, conceded, or acquiesced in modifying the objective "reasonable person" test to include consideration of respondent's age, or in a *de novo* review of the witnesses' credibility regarding whether the police deliberately engaged in a "question first, warn later" scheme. The first time that either issue was raised was when the Illinois Supreme Court issued its opinion. In addition, as *Cohen* demonstrates, petitioner was not obligated to file a petition for rehearing in order to preserve the issues for this Court's review.

II. This Case Gives This Court The Opportunity To Rule Squarely On The Issue Of Whether The "Reasonable Person" Test May Include Consideration Of The Suspect's Personal Characteristics.

Respondent makes two arguments in opposition to certiorari, but neither has merit. First, respondent argues that the discussion in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), about whether the "reasonable person" standard should include consideration of a suspect's age was merely *dicta*. (Resp. Br. at 7-8). But the fact *Yarborough* did not rule on this issue directly actually favors granting the petition.

In *Yarborough*, the Court addressed the question of whether age and experience with the police can be part of the "reasonable person" test in the context of the standard set forth by the AEDPA. *Id.* at 668. Although the Court appeared to reject consideration of a suspect's individual characteristics, its reasoning was limited to whether the state court had unreasonably

applied clearly established federal law. *Id.* The fact that *Yarborough* was so limited is a significant reason why the Court should grant the petition, as this case squarely presents the issue of whether the objective reasonable person test should incorporate a suspect's particular characteristics.

Respondent's second argument in opposition to granting certiorari is that the Illinois Supreme Court's ruling "did not turn on respondent's status as a juvenile." (Resp. Br. at 8) This claim is simply false. The court's entire analysis was based on its consideration of respondent's age. Indeed, the court made clear at the outset that respondent's age was essential to its analysis, stating: "[w]hen assessing whether a juvenile was seized for purposes of the fourth amendment, we modify the reasonable person standard to consider whether a reasonable juvenile would have thought that his freedom of movement was restricted." (Pet. App. 28a). In fact, the court articulated the question before it as "whether a *reasonable juvenile*, in defendant's situation, would have believed that he was compelled to accompany detectives to the police station for questioning and whether he would not have felt free to leave once there." (Pet. App. 29a) (emphasis added). This modified approach to the reasonable person standard infected the court's entire analysis of the Fourth Amendment issue. For example, the court emphasized "facts show[ing] that [respondent] *was 15 years old with no criminal record* when two detectives came to his apartment and asked him to accompany them to the police station for questioning in regard to a murder investigation." (Pet. App. 29a) (emphasis added). In addition, in finding that the passage of time caused respondent's presence at the station to become an illegal

arrest, the court stressed that its holding "is particularly true when the person in question is a minor." (Pet. App. 38a).

The significance of the court's focus on a "reasonable juvenile" is also evident from its conclusion that respondent was held involuntarily, because no reasonable person in respondent's position would have felt that he was seized. Importantly, respondent came to the police station voluntarily, a fact he has not challenged. (Pet. App. 34a-36a). And respondent's voluntary presence at the station was not transformed into an illegal seizure at some later time. At the station, respondent was neither fingerprinted nor photographed; instead, he went into an interview room. (Pet. App. 11a). As explained by Detective Bautista, this was consistent with police protocol, which recognizes that it is not safe to allow the general public to wander the back halls of a police station unescorted. (Pet. App. 11a-12a). These safety concerns are particularly pronounced where potential witnesses are concerned, because restricting their movement within the police station and keeping interview room doors closed protects them from being seen by others at the station, such as arrestees who may seek to retaliate against them.

Similarly, while respondent was not advised of his *Miranda* rights, that was because he was a witness, not a suspect. (Pet. App. 11a). Respondent was not handcuffed, and the door to the room was unlocked. (Pet. App. 11a). After the initial 15 to 20 minute conversation, the detectives left respondent alone while they continued their investigation. (Pet. App. 11a).

As before, respondent was neither handcuffed nor restrained in any manner, and the door to the room was left unlocked. (Pet. App. 12a).

There also was no evidence that the police had indicated to respondent that he was not free to leave. According to Bautista, it was only after Leal's inculpatory statement shortly before 6:00 p.m. that respondent would no longer have been allowed to go. (Pet. App. 13a). Even then, however, no officer told respondent, directly or indirectly, that he was not free to leave.

In sum, respondent's assertion that his "status as a 15-year-old juvenile had virtually nothing to do with this analysis" (Resp. Br. at 11) is belied by the record. The Illinois Supreme Court expressly modified the objective reasonable person standard to consider his age and experience. But for the consideration that respondent was 15 years old with no criminal justice experience, the court would have had to find that an objectively reasonable person in his position would not have felt that he was under arrest, as the trial and appellate courts did.

III. The Illinois Supreme Court's Consideration Of The Respondent's Age And Experience When Determining Whether He Was Seized Or In Custody Conflicts With The Decisions Of This Court.

Respondent also argues that certiorari should be denied because this Court in *Yarborough* stated that "our opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration" (*Yarborough*, 541 U.S. at 666) and none of the cases cited by petitioner, except *Yarborough*, involved minors. (Resp. Br. at 12). Again, this simply bolsters the reasons why this Court should grant the petition. Without guidance from this Court, several lower courts have incorporated such subjective characteristics into the objective reasonable person test. *See, e.g., Evans v. Montana Eleventh Judicial District Court*, 995 P.2d 455, 459 (Mont. 2002); *Ramirez v. State*, 739 So.2d 568, 574 (Fla. 1999); *State v. Werner*, 9 S.W.3d 590, 598 (Mo. 2000); *United States v. Erving L.*, 147 F.3d 1240, 1247-48 (10th Cir. 1998); *People v. T.C.*, 898 P.2d 20, 25 (Colo. 1995) (en banc); *Commonwealth v. A Juvenile*, 521 N.E.2d 1368, 1370 (Mass. 1988); *United States v. Wauneka*, 770 F.2d 1434, 1438-39 (9th Cir. 1985). In contrast, other courts have refused to consider personal characteristics when utilizing the objective reasonable person standard. *See, e.g. State v. Turner*, 838 A.2d 947, 963 (Conn. 2004); *People v. Croom*, 883 N.E.2d 681, 689 (Ill. App. Ct. 2008).

For its part, although this Court has never incorporated subjective characteristics into this objective standard, it has emphasized that the test for

determining whether a suspect has been seized under the Fourth Amendment or is in custody for *Miranda* purposes, is an objective one. *See, e.g., Florida v. Bostick*, 501 U.S. 429, 437-39 (1991) and *Stansbury v. California*, 511 U.S. 318, 323 (1994). That certain lower courts have departed from this principle is precisely why certiorari is appropriate here.

IV. The Circuits Have Split Over Whether To Use A *De Novo* Or A "Clear Error" Standard When Reviewing Whether The Police Have Deliberately Engaged In A "Question First, Warn Later" Scheme In Order To Circumvent *Miranda v. Arizona*, And The Illinois Supreme Court's Decision Finding Such A Scheme In This Case Demonstrates Confusion About The Viability Of *Oregon v. Elstad*.

Respondent argues that "[p]etitioner has clearly failed to demonstrate any split in the circuits regarding the proper standard of review for a *Seibert* claim." (Resp. Br. at 15). But the Seventh Circuit's recognition of the split (*see United States v. Stewart*, 536 F.3d 714, 719 (7th Cir. 2008)), demonstrates otherwise. In particular, when discussing the proper standard for reviewing whether the police have deliberately engaged in a "question first, warn later" scheme like that in *Missouri v. Seibert*, 542 U.S. 600 (2004), *Stewart* observed that "[t]here is not yet a general consensus among the circuits about the standard of review that applies to *Seibert*-deliberateness determinations, but the trend appears to be in the direction of review for clear error." *Id.* Moreover, *Stewart* also belies respondent's claim that "[i]t is incomprehensible how petitioner can allege that either of these cases

[*United States v. Carter*, 489 F.3d 528, 536 (2d Cir. 2007), and *United States v. Street*, 472 F.3d 1298, 1314 (11th Cir. 2006)] 'appears' to establish a *de novo* standard of review of a *Seibert* claim." (Resp. Br. at 14-15). Far from being "incomprehensible," *Stewart* noted that both *Carter* and *Street* "appear[ed] implicitly to apply *de novo* review." 536 F.3d at 719.

Respondent also argues that "the Illinois Supreme Court did not adopt a *de novo* standard when evaluating the *Seibert* claim in this case." (Resp. Br. at 15). However, as explained in the petition (at pp. 30-32), the supreme court showed no deference to the trial court's credibility determinations. Despite acknowledging that the trial court found Detective Keane credible, while at the same time explicitly noting that "defendant does not challenge the trial court's credibility assessment as being against the manifest weight of the evidence" (Pet. App. 50a), the supreme court nevertheless determined that Keane was not telling the truth when he stated that he did not deliberately withhold *Miranda*. (Pet. App. 50a). Certainly, the court's rejection of the trial court's factual findings demonstrates that it applied a *de novo* rather than a "clear error" standard, because "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, *can virtually never be clear error*." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (emphasis added).

Finally, respondent asserts that his written statement after receiving *Miranda* warnings provided

only "slightly more detail" than his initial, unwarned oral statement. (Resp. Br. at 19). However, his oral statement to the police was, as the supreme court itself acknowledged, "brief," and provided only that respondent had entered the victim's apartment, that the victim was tied up and stabbed, and that he and his co-defendants took some "proceeds." (Pet. App. 17a). In contrast, respondent's handwritten statement to the prosecutor was extensive and detailed, totaling twelve pages in length. Respondent also ignores several other factors. For instance, unlike in *Seibert*, where just 15 to 20 minutes separated the unwarned interrogation from the warned interrogation (542 U.S. at 616), the delay between the unwarned questioning and respondent's confession was over three hours. (Pet. App. 16a-18a). Another significant difference is that the same officer conducted both the unwarned and warned interrogations in *Seibert* (*id.*), while here a prosecutor conducted the warned questioning, and not the detective who conducted the initial, unwarned interrogation (Pet. App. 16a-18a). Also unlike in *Seibert* (*id.* at 616-17), there was no evidence that respondent's unwarned statement was used to prompt his later, warned confession. Most significantly, the officer in *Seibert* testified that "he made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the questions 'until I get the answers she's already provided once.'" *Id.* at 605-06. There is no evidence of any such institutional policy here. To the contrary, Detective Keane expressly denied that he made a decision not to arrest respondent in order to question him without warnings; testimony which the trial court deemed credible. (Pet. App. 17a).

In addition to deepening the split of authority regarding the standard of review for a *Seibert* claim, the Illinois Supreme Court's decision also creates confusion about the continued viability of *Oregon v. Elstad*, 470 U.S. 298 (1985). In *Elstad*, this Court held that the failure to administer *Miranda* warnings prior to the defendant's initial inculpatory statement did not automatically require suppression of his subsequent *Mirandized* confession. *Id.* at 300, 308, 318. The Court explained that, where the initial unwarned statement was given voluntarily, the admissibility of the second statement depended only on whether it, too, was voluntary and obtained in compliance with *Miranda*. *Id.* at 318. Thus, this Court articulated the principle that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id.*

In contrast, in *Seibert*, this Court's plurality opinion explained that the deliberate, two-round interrogation technique at issue was unconstitutional because it "effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted." 542 U.S. at 617. The plurality contrasted *Elstad* by characterizing the situation there as one involving an inadvertent violation of *Miranda* and listed "a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object." *Id.* at 615. Based on these "relevant facts," the plurality concluded that the intentionally delayed warnings were ineffective and therefore, the second statement was inadmissible. *Id.* at 616-17.

Concurring, Justice Kennedy, considered the plurality's "relevant facts" for inadmissibility as too broad. *Id.* at 621-22. In his view, the pertinent question was whether the police set out to withhold *Miranda* warnings deliberately until after a confession has been secured. *Id.* Specifically, "[t]he admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed." *Id.* at 622.

The trial court in this case followed *Elstad* because it found that the police did not employ a deliberate two-step strategy to circumvent *Miranda*. The Illinois Supreme Court, however, disregarded the trial court's factual findings and failed to consider Justice Kennedy's admonition about the continued viability of *Elstad*. Accordingly, this case presents this Court with the opportunity to clarify its holding in *Seibert*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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